July 1917

Case and Comment

The Lawyers Magazine

VOLUME XXIV NUMBER 2

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The Passing of a Great Lawyer

Great as a lawyer, great as a diplomat, great as a man, Joseph Hodges Choate died on May 14, at the age of 85.

Notwithstanding his advanced years Mr. Choate took an active part in the entertainment of the French and British War Commissions in New York. He was chairman of the reception committee that met M. René Viviani, Marshal Joffre, and other distinguished members of the French Mission, and acted in a similar capacity when the British Mission, headed by Arthur James Balfour, arrived in New York. At the reception in City Hall for Mr. Balfour and the British Commission Mayor Mitchel referred to Mr. Choate as the "foremost citizen of New York." At the banquet for the British and French Commissions Mr. Choate was one of the speakers, and on the following evening he entertained with a small dinner at his home for Mr. Balfour. Mr. Choate was a personal friend of the British Foreign Secretary, and they saw much of each other during the stay of the British Commission in New York. His active participation in the city's welcome to the two war commissions was far more than Mr. Choate had attempted in many years. Finally, on the evening of May 11, as one of the principal speakers at the great banquet to the allied commissioners, he delivered what proved to be his farewell public address. Mr. Choate spoke in his customary happy style and was as eloquent as at any time in his career.

His abilities as a trial lawyer were recognized by William M. Evarts, with whom he was induced to join in forming the firm of Evarts, Choate & Beaman. As a member of that firm Mr. Choate conducted many notable cases, among them the defense of General Fitz-John Porter, the prosecution of the Tweed ring, the Tilden will contest, the Chinese exclusion cases, the litigation which decided the unconstitutionality of the income tax of 1894, and the Bering sea controversy.

His practice was for many years more lucrative than that of any other lawyer in New York. The years Mr. Choate spent as Ambassador to the Court of St. James gave him a high reputation in England. He was the first American lawyer to be made a "Bencher of the Middle Temple." His wit was keen. His tact was superb. While he was recognized for many years as the leader of the New York bar, his fame will rest also upon his brilliant career as a diplomatist and his success as an orator on occasions of great public moment, and as an after-dinner speaker.

JOSEPH H. CHOATE ACTING AS CHAIRMAN OF THE COMMITTEE THAT MET THE FRENCH COMMISSION.

Case and Comment

VOL. 24 JULY 1917 No. 2

The Declaration of Independence

BY JOHN H. HAZELTON

[Ed. Note. Mr. Hazelton is a lawyer of New York City, and the author of "The Declaration of Independence: Its History,"—published by Dodd, Mead & Co. We were fortunate in being able to procure from him for Case and Comment this interesting and valuable article. Of Mr. Hazelton's work, the late Charles Francis Adams writes: "I make bold to say that no person can now conduct an inquiry into which the crisis of American independence, and its subsequent growth enter as an element, without consulting this book."]

MANY who listen to the reading of the Declaration of Independence on each "Independence Day," I am sure, imagine that, on July 4, 1776, John Hancock and the others whose signatures are there appended suddenly decided that the colonies ought to be free and independent states, and, therefore, all on that day, conceived, adopted and published to the world this immortal instrument.

Such papers, however, do not so come from a clear sky.

They must be born in travail.

The Declaration was the natural outcome of the ever-increasing centralization of power for defense, and of the awakening of the people; but it was a much-deferred outcome,—due to the inherent love of the colonists for the Crown and to the extremely slow means of communication among the colonies.

Without the act declaring the colonists out of the King's protection; the burning words of Thomas Paine in "Common Sense"; and the necessity, as was felt, of foreign alliance,—it might never have come at all.

The colonists were loath to think of such a thing.

We find in a letter of John Adams, of Massachusetts, to General Gates, of March 23d: "If a Post or two more, should bring you unlimited latitude of Trade to all Nations, and a polite Invitation to all nations, to trade with you, take care that you don't call it, or think it Independency. No such Matter—Independency is an Hobgoblin, of so frightfull Mein, that it would throw a delicate Person into Fits to look it in the Face."

North Carolina was the first of the colonies—on April 12th—to authorize her delegates "to concur with the delegates of the other colonies in declaring independency." Virginia was the first—on May 15th—to authorize her delegates "to propose [to Congress] . . . to declare the United Colonies free and independent states."

Previous to that, the word had been most carefully avoided in all public proceedings.

Both of these resolutions were laid before Congress on May 27th; and

It was pursuant to the latter resolution, of Virginia, that Richard Henry Lee, of Virginia, on June 7th, moved the resolution which was the basis of the Declaration of Independence: "That these United Colonies are, and of right ought to be, free and independent states, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved."

John Adams immediately seconded it, but its consideration was "referred till to-morrow morning," when the members were "enjoined to attend punctually at 10 o'clock in order to take the same into consideration."

(335)

The PENNSYLVANIA EVENING POST.

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Vol. II.] SATURDAY, JULY 6, 1776. [Num. 228.

In CONGRESS, July 4, 1776.

A Declaration by the Representatives of the United States of America, in General Congress assembled.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God intitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, That all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great-Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made Judges dependant on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independant of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offences:

For abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of cruelty and

By courtesy of John H. Hazelton, Esq.

FIRST NEWSPAPER PUBLICATION OF THE DECLARATION OF INDEPENDENCE.

On the 8th, and again on Monday, the 10th, of June, this resolution was debated,—on both days, in the Committee of the Whole, and on both days until 7 o'clock in the evening.

The debate must have been a very interesting one. Thomas Jefferson, of Virginia, tells us that John Adams, Richard Henry Lee, George Wythe, also of Virginia, and others, were in favor of the resolution; James Wilson, of Pennsylvania, Robert R. Livingston, of New York, Edward Rutledge, of South Carolina, John Dickinson, of Pennsylvania, and others, opposed to it.

As expressed, on the evening of the

8th, by Rutledge in a letter to John Jay, of New York: "The whole Argument was sustained on one side by R. Livingston, Wilson, Dickenson, and myself, & by the Power of all N. England, Virginia & Georgia at the other."

The substance only of the arguments, *pro* and *con*, have been preserved to us.

Following the debate,—and after the coming in of the Committee of the Whole —Congress, on the 10th, resolved that the further consideration of the "resolution be postponed to this day three weeks [to July 1st], and in the meanwhile that no time be lost in case the Congress agree thereto, that a committee be appointed to prepare a declaration."

It was a compromise resolution,—"carried by seven colonies against five."

The words, "that no time be lost in case the Congress agree thereto," were based upon the following words: "least any time shd. be lost in case the Congress agree to this resolution," in the handwriting of Robert R. Livingston, in the report of the Committee of the Whole.

Jefferson says: "It appearing . . . that the colonies of N. York, New Jersey, Pennsylvania, Delaware & Maryland were not yet matured for falling from the parent stem, but that they were fast advancing to that state, it was thought most prudent to wait awhile for them, and to postpone the final decision to July 1."

Or, as Elbridge Gerry, of Massachusetts, puts it: The postponement was "to give the assemblies of the middle colonies an opportunity to take off their restrictions and let their delegates unite in the measure."

On the 11th, the committee was appointed to draft the Declaration.

And Jefferson—who already "had the reputation of a masterly pen"—was chosen at the head of the committee, and became the draftsman.

He had arrived in Philadelphia, May 14th, having "set out for Philadelphja" on the 7th. He had been absent since December, 1775, and writes: "I have been so long out of the political world that I am almost a new man in it."

On the 17th (of May, 1776), he writes, to his colleague Nelson: "I am at present in our old lodgings tho I think, as the excessive heats of the city are coming on fast, to endeavour to get lodgings in the skirts of the town where I may have the benefit of a freely circulating air." And, on the 23d, we know that he took "lodgings at Graaf's,"—which was at the southwest corner of Seventh and Market streets.

He was "in the same uneasy, anxious state in which" he "was last fall without Mrs. Jefferson, who could not come with" him.

Here it was, "at Graaf's," in "a new brick house 3 stories high of which" he "rented the 2d floor consisting of a parlour and bed room ready furnished," that he penned the rough draft.

One cannot but wonder what were his thoughts:

Did he feel as Shakespeare must have felt when he wrote:

> Nor marble, nor the gilded monuments
> Of princes, shall outlive this powerful rhyme?

We know that he wrote, in after years, in his autobiography: "I have sometimes asked myself whether my country is better for my having lived at all? I do not know that it is. I have been the instrument of doing the following things; but they would have been done by others; some of them perhaps a little better. . . . The declaration of independance."

But how long he took, we do not know.

We know that he says: "I turned to neither book or pamphlet while writing it": "whether I had gathered my ideas from reading or reflection I do not know."

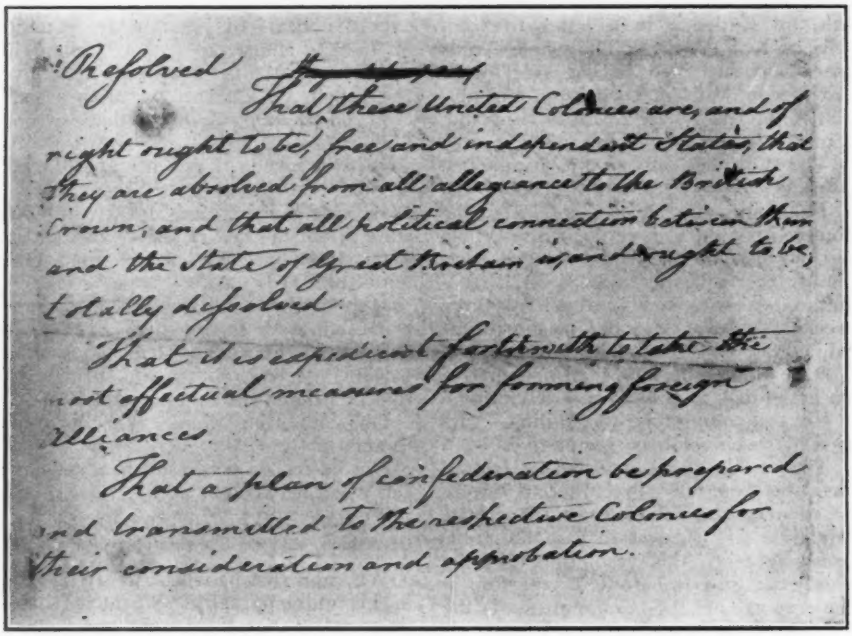
We know, too, that he showed it to Benjamin Franklin, of Pennsylvania, and to John Adams, and that Adams suggested two, and Franklin five, slight changes, all of which were adopted.

We know that Adams made a copy.

The other members of the committee were Roger Sherman, of Connecticut, and Robert R. Livingston, who, as we have seen, was *opposed* to a declaration.

The draft, recopied into a "fair copy" and slightly corrected, even after consulting Adams (at least), was submitted to Congress on June 28th, and ordered to lie on the table.

The period of the postponement had then almost expired, and the news, in


Resolved
That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be, totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.

By courtesy of John H. Hazelton, Esq.

COPY OF ORIGINAL OF INDEPENDENCE RESOLUTIONS.

general, from the doubtful colonies was good.

It had been awaited with great anxiety.

We cannot here follow in detail what was done in these doubtful colonies during the postponement; but it may perhaps be interesting to know, at least, that the delegates of New York wrote in haste, on the 8th, for instructions; that New Jersey elected five new delegates on the 23d, and empowered them to join with the delegates from the other colonies "in declaring the United Colonies independent"; that Thomas M:Kean, of Delaware, himself went to the "lower counties" and returned "with full powers"; that there was great contention in Pennsylvania; and that Maryland, at the last moment, as we shall see, followed in the footsteps (of North Carolina and) of New Jersey—Samuel Chase, of Maryland, writing to John Adams on the 28th: "Our people have fire if not smothered."

On this same day, Joseph Hewes, of North Carolina, at Philadelphia, writes: "On Monday [July 1st] the great question of independency . . . will come on. It will be carried, I expect, by a great majority, and then, I suppose we shall take upon us a new name."

July 1st opened, "Fine sunshine, grew very warm." Maryland had not yet been heard from.

Congress resolved itself again into a Committee of the Whole; and Dickinson and John Adams again spoke.

Dickinson—"a shadow; tall, but slender as a reed; pale as ashes"; Adams—"whose deep conception, nervous style, and undaunted firmness," writes Jefferson, "made him truly our bulwark in debate."

This was the great day of the debate, although John Adams, in after years, says that "I expected no more would be said in public, but that the question would be put and decided."

"Mr. Dickinson, however, was determined," he says, "to bear his testimony against it with more formality. He had prepared himself apparently with great labour and ardent zeal, and in a speech

of great length, and all his eloquence, he combined together all that had before been . . . said in Congress by himself and others. He conducted the debate, not only with great Ingenuity and Eloquence, but with equal Politeness and Candour: and was answered in the same Spirit."

After the debate had ended, Adams wrote to Chase, acknowledging his letter of the 28th, and telling him that the good news from Maryland "was brought into Congress . . . just as we were entering on the great debate. That debate," he says, "took up most of the day, but it was an idle mispence of time, for nothing was said but what had been repeated and hackneyed in that room before an hundred times for six months past. In the Committee of the Whole the question was carried in the affirmative, and reported to the House. A Collony [South Carolina] desired it to be postponed until to-morrow, then it will pass by a great Majority, perhaps with almost unanimity; yet I cannot promise this, because one or two Gentlemen may possibly be found who will vote point blank against the known and declared sense of their Constituents. Maryland, however, I have the pleasure to inform you, behaved well.—[William] Paca [of Maryland], generously and nobly . . . If you imagine that I expect this Declaration will ward off calamities from this Country, you are much mistaken. A Bloody conflict we are destined to endure. This has been my opinion from the beginning. If you imagine that I flatter myself with happiness and Halcyon days after a separation . . . you are mistaken again . . . But Freedom is a Counter ballance for poverty, discord, and war, and more."

On the 2d of July, the resolution declaring independence was adopted,—unanimously except for New York, whose delegates did not vote.

So that we were really declared independent on July 2d instead of the 4th.

"S. Carolina concurred in voting for it; in the meantime a third member [Cæsar Rodney] had come post from the Delaware counties and turned the vote of that colony in favor of the resolution. members of a different sentiment attending that morning from Pennsylvania also, their vote was changed, so that the whole twelve colonies, who were authorized to vote at all, gave their voices for it."

Then, and not till then, the Declaration itself—which had been laid on the table on June 28th—was taken up, and considered during the rest of the 2d, on the 3d, and on the 4th.

Some changes were made in Jefferson's draft, of which he himself says he "was not insensible,"—changes which he indicated on his rough draft, already referred to, and which are often taken to be changes made by him in the course of the composition.

On the 4th, the Declaration was adopted, and ordered to be "authenticated & printed That the committee appointed to prepare the declaration superintend & correct the press. That copies of the declaration be sent to the several assemblies, conventions & committees or councils of safety and to the several commanding officers of the continental troops that it be proclaimed in each of the united states & at the head of the army."

The Declaration appeared for the first time in a newspaper on the 6th.

The New York Convention, sitting at White Plains, approved of it on the 9th.

It was engrossed on parchment and signed, in the main, on August 2d.

It did not appear in the London papers until August 17th.

The Declaration of Independence is one of the greatest papers in the world's history.

It linked the Magna Charta with the Proclamation of Emancipation.

Its spirit is encircling the globe.

What it says is true: "All men are *created* free and equal,"—not in health or circumstances or powers (because this cannot be), but in *natural rights*.

And its doctrine *will* prevail, no matter at what cost.

All governments derive "their just powers from the consent of the governed."

John H. Haystead

EMBARKATION OF THE PILGRIMS.—WEIR.

The Mayflower Compact

BY WILLIAM D. GUTHRIE

of the New York City Bar

WHEREVER Americans gather, at home or abroad, those who can claim the proud heritage of descent from the Pilgrims on the Mayflower are accustomed annually to join in thanksgiving for all that they owe to their ancestors. The spirit which prompts these celebrations is singularly wholesome, and indeed holy. Among the natural instincts of the heart, common to all races, is a longing for communion with the past, which manifests itself in the worship of ancestors. That this spirit of reverence has been from the earliest ages a most powerful religious and patriotic force is a fact familiar to us in the history of the Egyptions, the Greeks, and the Romans. We readily recall the beautiful ceremonial of pagan Rome on the *dies parentales,* when violets and roses, and wine, oil, and milk, were offered, and *aves* were chanted to the spirits of their dead.

An impressive example of the survival of this instinct in modern times is afforded by the Japanese, who daily, at innumerable household shrines and public temples erected to Shinto, worship their ancestors as the gods of the home and of the nation. When, twenty years ago, Japan so easily defeated the Chinese Empire with ten times the population of Japan, the surprise and marvel of the world impelled one of the most brilliant writers of our generation to seek the source of the fortitude, the indomitable spirit, and the military valor of the Japanese. He did not expect to find it in their form of government or in their laws, for he realized the great truth that mere forms of government and laws possess no magical or supernatural virtue, and are of little moment in nations in comparison with the moral character of their leaders and their people. He discovered, as he believed, that the secret of the civil and martial power of the Japanese, and the source of their moral energy and virtue,—I use virtue in the Latin sense of valor,—lay in the vital and all-pervading worship of their ancestors, based upon the deep-rooted belief that all things are determined by the dead. He found that this homage excited at once the deepest emotion and the most powerful inspiration of the race, shaping their national character, directing their national life, teaching them reverence, obedience, self-restraint, temperance, loyalty, courage, devotion, and sacrifice, and making them ever conscious of the prodigious debt the present owes to the past, as well as keenly sensible of the duty of love and gratitude to the departed for their labors and suffering. "They," the dead, he eloquently wrote, "created all that we call civilization, —trusting us to correct such mistakes as they could not help making. The sum of their toil is incalculable; and all that they have given us ought surely to be very sacred, very precious, if only by reason of the infinite pain and thought which it cost." And then he added, "Yet what Occidental dreams of saying daily, like the Shinto believer: *'Ye forefathers of the generations, and of our families, and of our kindred,—unto you, the founders of our homes, we utter the gladness of our thanks!'* "[2]

In the reverential spirit so beautifully

[1] Remarks at the twenty-first annual banquet of the Society of Mayflower Descendants in the State of New York, held at the Hotel St. Regis, New York, November 23, 1915. Reprinted by permission from volume entitled "Magna Carta and Other Addresses," published and copyrighted by the Columbia University Press, New York.

[2] Lafcadio Hearn, Kokoro, pp. 289, 290.

EMBARKATION OF THE PILGRIMS.—WEIR.

expressed by this Japanese prayer, I venture upon a necessarily brief and imperfect review of a subject of transcendent and enduring interest to Americans,—the debt that American constitutional government, under which we enjoy the blessings of civil and religious liberty and of just and equal laws, owes to your ancestors of the Mayflower.

In these days of superlative comfort and affluence, it is difficult for us, assembled in this palatial hall, feasting better than the Cæsars feasted, and served as not even princes were served three hundred years ago,—difficult, if not impossible, is it, to carry our minds from this gorgeous and almost oppressive luxury back through the centuries to November, 1620, to the Mayflower covered with snow and ice, and buffeted by fierce winter winds off the bleak and desolate coast of Cape Cod. Equally difficult is it to picture to ourselves, and in imagination to breathe the air of, that first American constitutional convention, in the cramped and chilling cabin of the Mayflower, when the Pilgrim Fathers were assisting, as Bancroft says, at "the birth of popular constitutional liberty," and were discussing the provisions of what has since been called the first written Constitution ever framed by a people for their own government from the time history began to record human politics and human successes and failures. I need not stop to read the contents of the completed draft of that Constitution, conceived in the then vague prompting, which one hundred and fifty-six years later was to be proclaimed in our Declaration of Independence as a self-evident truth, that all governments must derive "their just powers from the consent of the governed." Nor shall I read the names of the forty-one immortals who executed that compact in order to evidence their covenant of due consent and promise of obedience to its provisions and spirit. Surely, if there be one constitutional document which should be familiar to all Americans, and particularly to the descendants of the Pilgrims, it is the Mayflower Compact of November 21, 1620.[3]

Many of us believe that the compact thus entered into was the prototype of the Constitution of the United States, that the government it established was the beginning of the republican form of government now guaranteed alike to nation and state, and that the covenant it contained for just and equal laws was the germ from which has since developed our whole system of constitutional jurisprudence. This covenant reads: "We . . . doe by these presents solemnly & mutualy in ye presence of God, and one of another, covenant & combine ourselves togeather into a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall laws, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie, unto which we promise all due submission and obedience." Surely, this simple, comprehensive, and lofty language, in the style of the Bible open before the Pilgrims, embodies the true and invigorating spirit of our constitutional polity as it flourishes to-day.

[3] The original manuscript of the Mayflower Compact has been lost or destroyed. The text, as preserved by Governor Bradford in his annals entitled, "Of Plimoth Plantation," is as follows:

"In ye name of God, Amen. We whose names are under-writen, the loyall subjects of our dread soveraigne Lord, King James, by ye grace of God, of Great Britaine, Franc, & Ireland king, defender of ye faith, &c., haveing undertaken, for ye glorie of God, and advancemente of ye Christian faith, and honour of our king & countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia, doe by those presents solemnly & mutualy in ye presence of God, and one of another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie, unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd ye II. of November, in ye year of ye raigne of our soveraigne lord, King James, of England, France, & Ireland ye eighteenth, and of Scotland ye fiftie fourth. Ano: Dom. 1620." Printed in the Collections of the Massachusetts Historical Society, 4th series, vol. 3, pp. 89, 90. See also the text in Davis's Bradford, History of Plymouth Plantation, 1908 ed. p. 107.

In order to appreciate the political greatness and the moral grandeur of the work of the Pilgrims, we should recall that when the Mayflower Compact was framed, in no part of the world did there exist a government of just and equal laws, and that in no country was there real religious liberty or the complete separation of Church and State.

In fact, the great and now fundamental principle of the separation of Church and State was first made a living reality by the Pilgrims, although, in theory at least, it antedated the voyage of the Mayflower. It was the essence of their holy covenant of congregation, entered into years before. And to the Pilgrims chiefly are due the credit and honor of incorporating this principle into Anglo-American polity. A wide gulf separated the Pilgrims from the Puritans in this respect. The Pilgrims, first known in England as the Separatists and Brownists, —hated alike by Puritan and Cavalier,— advocated religious liberty and the complete separation of Church and State. The Puritans, however, when they secured power in England and later in New England, were intolerant in religion, and opposed both to religious liberty and to the separation of Church and State. They were determined that the state should dominate in religious as well as in civil affairs, and that it should regulate the religion of all; in truth, they sought to impose a dominant theocracy as completely as Henry VIII. and Elizabeth were determined to have a state church under their own spiritual supremacy and to abolish all "diversity of opinions,"—if necessary by rack, fire, and the scaffold. The Pilgrim, personifying him as you love to in the lofty and generous spirit of Robinson at Leyden, believed in religious freedom, or, as it is differently phrased, in liberty of conscience; the Puritan was determined that all should be coerced by legislation and the sword to conform to his religious views as the only true faith. Although the Puritan theocracy found its most complete development and tyranny in Massachusetts, the colony of Plymouth remained liberal and tolerant. Notwithstanding the terrible record of sanguinary persecutions among other religious denominations of that age, no instance is recorded of religious persecution by the Pilgrims or in the Plymouth colony.[4] You will recall that the famous Pilgrim captain, Miles Standish, never joined the Plymouth church, that no witches were ever burned in Plymouth, and that when a malicious woman accused a neighbor of witchcraft, she was promptly convicted of slander and thereupon fined and publicly whipped. The excesses and fury of religious persecution by Protestants and Catholics alike were the products of the fierce, intolerant, and blind spirit of that age. We should judge them, not by the standards of the twentieth century, but by those of the sixteenth and seventeenth centuries, and must not overlook the fact that in many cases these persecutions were as much political as they were religious.

In the history of New England the Pilgrim is often confused with the Puritan, undoubtedly because the Puritan soon dominated and ultimately absorbed the Pilgrim. Nevertheless, the differences between them on this question of religious tolerance and the separation of Church and State were implacable, to adopt the word of a great American historian. Yet, in differentiating between Pilgrim and Puritan and in recalling the facts as to the origin of religious freedom and the separation of Church and State,—the greatest of all the blessings we now enjoy,—in giving most of the glory to the Pilgrims, notwithstanding the claims of Catholic Maryland, I am not at all unmindful that in religion and in politics the Pilgrim and the Puritan had many views in common, that our debt to both is quite inseparable, and that our gratitude to them should be eternal.

It is certainly impossible to exaggerate the debt we owe to the Puritan spirit,— fierce, indomitable, and undaunted, even if intolerant,—for it was that spirit which cemented the foundations of our nation. It was the Puritan spirit that

[4] The legislation against the Quakers as enforced in the Plymouth colony seems to have been essentially political. The records, so far as we have them, indicate that the Quakers were proceeded against because of their attempts to disturb the peace and overthrow established law and order, and not because of their religious beliefs.

gave to England her noblest figures and her most inspiring traditions of battle fields. Towering above all other Englishmen is the lofty figure of the Puritan Cromwell, and second only to him are the Puritans Hampden, Pym, Selden, Milton, Vane, Hale. Hampden—the highest type of English gentleman, with a nobility and fearlessness of character, self-control, soundness of judgment, and perfect rectitude of intention, to which, as Macaulay declared, "the history of revolutions furnishes no parallel, or furnishes a parallel in Washington alone." If to-day England is to preserve her empire, upon which she boasts the sun never sets, she must appeal to the energy and fortitude and courage of the Puritan. She must invoke the spirit of Oliver Cromwell, whose mighty arm made the name of England terrible to her enemies and laid the foundations of her empire, who led her to conquest, who never fought a battle without gaining it, whose soldiers' backs no enemy ever saw, who humbled Spain on the land and Holland on the sea, and who left a tradition of military valor which is now the inspiration of the splendid courage, heroism, and sacrifice of England's soldiers on the continent of Europe.

A most important aspect of the Pilgrims' contribution to our political institutions is the provision for just and equal laws contained in the Mayflower Compact, for, as I have already suggested, in that provision is embodied the essence of our whole constitutional system. It has become a truism that the characteristic of the American system of constitutional government is equality before the law. We Americans accept this doctrine as of course. But we should appreciate that civil equality or equality before the law was practically unknown in Europe when the Mayflower Compact was written. In this country its development sprang in great measure gradually from the seed first sown by the Pilgrims. Neither the phrase, "equality before the law," so familiar to us as expressing a fundamental and self-evident truth, nor the term, "the equal protection of the laws," now contained in the 14th Amendment, is to be found in the English common law. Nor was either term, or any equivalent, in legal use in America at the time of the adoption of the Constitution of the United States. Indeed, the phrase, "equality before the law," is said to be a modern translation from the French. Nevertheless, equality in duty, in right, in burden, and in protection, is the thought which has run through all our constitutional enactments from the beginning.

The Pilgrim Fathers perceived, long before it was generally appreciated, that equal laws might fall far short of political justice and liberty, and hence they provided for "just and equal laws." They realized, perhaps indistinctly, that equality in itself, without other elements, is not sufficient to guarantee justice, and that, under a law which is merely *equal*, all may be equally oppressed, equally degraded, equally enslaved. They well knew that equality is one of the pervading features of most despotisms, and that a law may be equal, and yet be grossly arbitrary, tyrannical, and unjust. Obviously, a law confiscating all property of a certain kind would be equal if it applied to all having that particular kind of property. The laws of England then in force providing for one form of worship, "for abolishing diversity of opinions," as the title of the act of 31 Hen. VIII. recited, or compelling all to attend the same church and to take the same oath of religious supremacy and the sacraments of the same religious denomination, were all equal laws, because they applied to every one, no matter what his conscience might dictate. In the cabin of the Mayflower, the Pilgrim Fathers seem to have had a vision revealing to them the fundamental and essential political truth that equality is but an attribute of the liberty they were then seeking at the peril of their lives and the sacrifice of their fortunes, and that true liberty requires *just* as well as *equal* laws. To repeat, it was the Pilgrims who first sowed in our soil the seed of just and equal laws, and that seed has grown into the fixed rule of the American constitutional system, a rule which has spread through all our political and civil rights and duties until it reaches, pervades, unites, and invigorates the whole body politic.

The history of the Plymouth colony from 1620 until its absorption by the colony of Massachusetts in 1691 teaches us many lessons in political philosophy. There are two which I desire to recall to you: One as to the right to private property, the other as to pure democracy.

The Pilgrims began government under the Mayflower Compact with a system of communism or common property. The experiment almost wrecked the colony. As early as 1623, they had to discard it and restore the old law of individual property with its inducement and incentive to personal effort. All who now urge communism in one form or another, often in disguise, might profitably study the experience of Plymouth, which followed a similarly unfortunate and disastrous experiment in Virginia. History often teaches men in vain. Governor Bradford's account of this early experiment in communism in his annals of "Plimoth Plantation" is extremely interesting. The book is rich in political principles, as true to-day as they were three hundred years ago. After showing that the communal system was a complete failure, and that as soon as it was abandoned and a parcel of land was assigned in severalty to each famliy, those who had previously refused to work became "very industrious," even the women going "willingly into ye feild," taking "their litle ons with them to set corne, which before would aledg weaknes, and inabilitie," Bradford proceeds as follows: "The experience that was had in this comone course and condition, tried sundrie years, and that amongst godly and sober men, may well evince the vanitie of that conceite of Platos & other ancients, applauded by some of later times, —that ye taking away of propertie, and bringing in comunitie into a comone wealth, would make them happy and florishing; as if they were wiser then God. For this comunitie (so farr as it was) was found to breed much confusion & discontent, and retard much imploymet that would have been to their benefite and comforte. For ye yong-men that were most able and fitte for labour & service did repine that they should spend their time & strength to worke for other men's wives and children, without any recompence. The strong, or man of parts, had no more in devission of victails & cloaths then he that was weake and not able to doe a quarter ye other could; this was thought injuestice. The aged and graver men to be ranked and equalised in labours, and victails, cloaths, &c., with ye meaner & yonger sorte, thought it some indignite & disrespect unto them. . . . Let none objecte, this is men's corruption, and nothing to ye course it selfe. I answer, seeing all men have this corruption in them, God in his wisdome saw another course fiter for them."[5]

Although the colony of Plymouth began as a pure democracy under which all the men were convened to decide executive and judicial questions, the increase of population and its diffusion over a wider territory necessarily led to the transaction of official business through chosen representatives. The representative system was thus established by the Pilgrims in New England perhaps more firmly than elsewhere, and it became the cardinal principle of whatever efficiency, strength, and stability our republican governments now have. This system is menaced by the enthusiasm for change and by the fads of recent years, such as the initiative, the referendum, the recall, and direct primaries. In these political nostrums has been revived the crude notion that the masses, inexperienced as they are in the difficult and complex problems of government, are instinctively better qualified to guide than the educated few who are trained, instructed, and competent, and who, acting as the representatives of all, are bound in good conscience and sound policy to consider and protect the rights of the minority, of the individual, of the humble and weak, against the arbitrary will or selfish interest or prejudice of the majority.

There is no time, even if your patience would bear with me longer, to trace the growth of the political principles which we find in the history of the Plymouth colony and underlying the experiment in republican government there initiated under the Mayflower Compact.

[5] Collections of the Massachusetts Historical Society, 4th series, vol. 3, pp. 134–136.

If the tree is to be judged by its fruit, the framing of that compact in 1620 was one of the most important events in the history of the American people, and the document itself is one of the most interesting and inspiring of American constitutional documents. But I feel that I may appropriately suggest to you questions which are of immediate and urgent concern to us all, and they are whether the quickening and stirring message of the Mayflower has really endured,—whether the sterling qualities of the Pilgrim and the Puritan have survived,—whether the descendants of the Pilgrims have inherited and can perpetuate the invincible spirit, the unconquerable moral energy, the indomitable steadfastness of their ancestors,—and whether these qualities are available in our own day to guide the nation safely and wisely through the inevitable crisis which we are approaching as the whole civilization of Europe is being daily more and more engulfed in the abyss of this awful war. These are problems which our generation must face sooner or later. And who should be better qualified to guide us—for it is leadership that we need—than men who inherit the spirit and the traditions of the Pilgrim and the Puritan?

In this crisis, the greatest in our national affairs since 1861, I hope we shall profit by the example of the founders of Plymouth who, as Palfrey wrote, "gave diligent heed to arrangements for the military defense of the colony." It may be also that Providence will give us, in the descendant of a Pilgrim, the captain who shall be both our shield and our weapon as Miles Standish was the shield and the weapon of your ancestors.

RETURN OF THE MAYFLOWER.—BOUGHTON.

The Fourth of July in the Far East

BY HON. CHARLES SUMNER LOBINGIER

***Judge United States Court for China; formerly Judge Court of First Instance, Philippine Islands*[1]**

THE struggle which this day primarily commemorates, and whose most spectacular feature was the Declaration of Independence, was not, it is now recognized, a merely local and isolated episode in history. Thanks to the suggestive work of British historians like Lecky and Sir George Trevelyan, we have come to see that the American Revolution can fully be understood only when studied in connection with preceding acts in the great drama of Anglo-Saxon democracy's unfolding, of which our revolution was an integral part. The colonists of 1776 were largely Englishmen; all were at least heirs of English thought and civilization. And just as the insular Englishmen of the seventeenth century sent their King to the scaffold so the colonial Englishmen of the eighteenth indicted theirs. For the Declaration of Independence was nothing more nor less than a criminal indictment; its glittering generalities are mere surplusage, sometimes misleading and often grossly misapplied. When the commonwealth leaders captured Charles I. they did not assassinate or torture him,—they tried him according to law, found him guilty of a criminal offense, and imposed the corresponding penalty. The Continentals of the succeeding century never possessed the person of George III.; hence they could not formally try him according to English usage; but they indicted him. In the Declaration of Independence the Continental Congress presents formal and specific charges,—not against the mother country, not against the British nation, but against the King. And they do not stop with mere charges: they offer evidence and, having no other tribunal, call the nations to judge. "To prove this," they recite at the close of what lawyers term "the charging part," "let facts be submitted to a candid world." How careful they were to observe the forms, and even to employ the phraseology, of the law!

We must always remember, however, that an indictment is an *ex parte* document; its office is to state merely the prosecution's case. The important fact about the Declaration of Independence is not whether its recitals are all literally true, but that it was the legal and proper mode of procedure. The men who wrote and were responsible for it were lawyers, not necessarily practitioners, but men steeped in the eternal principles of the common law. It is said that, after the Bible, the book most widely read in the American colonies before the Revolution was Blackstone's Commentaries. The men of 1776 desired liberty, but in accordance with, and under the safeguards of, law. And this has been the chief mark of distinction between the struggles of English-speaking peoples and those, *e. g.*, of Latin-America. The former have adhered strenuously to at least the usages of law.

It has been my privilege to loiter at times in that little room of Independence Hall at Philadelphia where this Declaration, and later the others of that trinity of American political documents,—the Articles of Confederation and the Constitution,—were framed and adopted. It is indeed one of the most historic places in the western world, and sordid must be the soul of the American whose patriotism is not stirred by its associations. But I never appreciated its full significance until I stood within the gray walls of Westminster Abbey, whose Chapter House has been aptly called "the cradle

[1] Address on the occasion of the joint observance at Manila of the nation's birthday and the tenth anniversary of the inauguration of civil government in the Philippines.

OLDEST EXTANT JUDGMENT OF AUDIENCIA.
(Supreme Court) de Manila (1601 or 1603).

of all free parliaments;" for it was there in 1265 that the assembled estates met which afterward became the mother of all existing legislatures,—of our own as well as those of Europe. The political history of the English-speaking race is one and continuous, and its chief glory has been to bequeath democratic institutions to the modern world. Those epoch-making documents that emanated from the "Declaration Chamber" at Philadelphia, great and significant as they were, did not stand alone. They were worthy successors of, and in a class with, others which had issued amid the storm and stress of the Anglo-Saxon struggle for liberty—with Magna Charta, the Petition of Right, the Agreement of the People, the "Instrument of Government," and the Bill of Rights. And each of them embodied the idea which has thus become the heritage of all English-speaking peoples,—liberty in accordance with law.

The Idea Circles the Globe.

Had this heritage remained the exclusive possession of the Anglo-Saxon race there would be less fitness in our observance of the Fourth of July in the Far East. But these ideals of our liberty-loving forbears, their descendants have borne around the world. The century that followed the Declaration of Independence witnessed the greatest expansion of that race. Our American branch of it, spreading away from the fringe of settlements on the Atlantic coast, swept across the Alleghanies and into the great plains, over the Rockies and beyond, until at last they reached the sea, and then suddenly a dramatic and unforeseen event called them across the great Pacific and into the Far East. And all this time, while they were felling the forests and harnessing the rivers, pushing back the arid line,—

> Plunging the plowshare deep
> Into the prairie's thousand centuried sleep,

they were also building civil communities, founding great states and spreading the Anglo-Saxon idea of liberty in accordance with law.

And while the daughter branch was thus expanding, the mother branch was not stagnant. Checked for a time in the

West, it turned its face to the East, and England as well as America profited by the Revolution. From it the former learned so to govern her colonies as to hold them, and with this added knowledge went forth to new and greater conquests. It is a significant fact that Britain's proudest achievements abroad followed her defeat at Yorktown. Lord Cornwallis, who there surrendered his sword to Washington, afterward won great renown for the British arms on the battle fields of India, and became its first governor general. When in St. Paul's Cathedral at London I came upon the statue of Cornwallis garbed as a Knight of the Garter, and found near it the statue of Lord Nelson, England's greatest naval hero, I realized how high was the rank now accorded Cornwallis. For he was but one of a series of British Far-Eastern empire builders,—beginning with Clive in the middle of the eighteenth century, and including Sir Stamford Raffles at Singapore, Sir John Bowring at Hongkong, Sir Henry Pottinger and Sir Harry Parkes[2] at Shanghai, and Rajah Brooke at Sarawak. Such were the men who helped to give Britain that mighty dominion so eloquently described by our own Daniel Webster, "whose morning drum beat, following the sun and keeping company with the hours, encircles the earth with one continuous and unbroken strain of the martial airs of England." But they did more than this; for in bringing British rule into the Far East they brought with it peace and order among warring tribes and justice for oppressed peoples. The *pax Britannica* is as well established in this part of the world under King George V. as was the *pax Romana* under Augustus Cæsar. These British pioneers, in other words, have been doing for the Far East, though in a different way, what our humbler statesmen of backwoods and frontier, our Seviers and Robertsons, our Clarkes and Houstons, our Whitmans and Fremonts, had been doing for the wilds of Western America—all were extending the sway of the Anglo-Saxon notion of liberty in accordance with law. And so here in the Far East these two streams have met, and this work of extension has gained added momentum. A century and a third before Dewey, a British army of occupation reached the Philippines, but it did not remain. The task of implanting Anglo-Saxon ideas and institutions in the rich and beautiful Philippine isles has fallen to us of America, and in order to accomplish it we must remain.

[2] Whose statute in bronze now adorns "The Bund."

The Filipino Heritage.

The Fourth of July, then, is no mere local or provincial holiday; it commemorates rather a mighty landmark in the evolution of Anglo-Saxon liberty, and it was not without ample reason that a great British journalist, the late Mr. Stead, proposed it as a common holiday of all English-speaking peoples. Nor is its real significance confined to these; it belongs rather to all those peoples who have become the heirs of Anglo-Saxon thought and civilization, among whom are several peoples of the Far East. A former Philippine commissioner, who is incidentally a good friend of mine, recently contributed to one of our leading American magazines an article entitled "Shall the Filipinos have a Fourth of July?" But it has always appeared strange to me that he could not see that they already have one. For the day has even now earned a prominent place in the Philippine annals.

Far Eastern Significance of the Day.

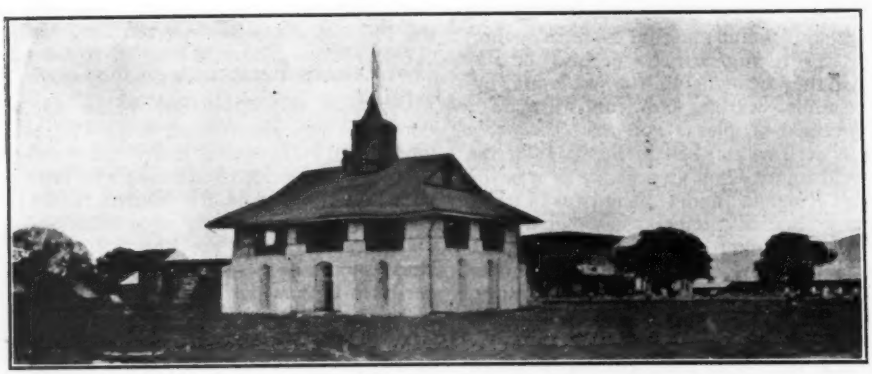
On that day, fourteen years ago, American civil government in the Philippines was inaugurated under the guidance of an American statesman who later became President of the United States. That day, thirteen years ago, witnessed the promulgation of the Philippine Bill, latest successor of those great political documents of which the Declaration of Independence was a type. That day, twelve years ago, saw the completion of the Pacific cable placing the Philippines in hourly touch with the progressive civilization of the West. Who shall say that the Fourth of July is not a day for Filipinos?

Natives of the Far East are now speaking and reading the language of

those same great documentary landmarks. For the English language is the medium of democratic ideas. It was the tongue of Cromwell and of Washington, of Lincoln and of Gladstone, as well as of Shakespeare, Milton, and Emerson. Each year in the Philippines alone nearly 600,000 native children in the public schools receive instruction through this medium of democracy. In China nearly all the higher institutions of learning (which are largely under American auspices) employ English as their chief means of teaching, and to a hardly less extent this is true in Korea and India. Now the public school is the product, as well as the nursery, of democracy. It is a part of the Anglo-Saxon heritage of the Filipino people, just as are their legislature,—youngest daughter of the "mother of parliaments,"—their system of local self-government, and their courts, which follow the Anglo-Saxon accusatorial, and not the Latin inquisitorial, procedure.

And so this historic day has come to have a new significance in the Far East, a significance peculiar to this region, and not less important to natives than to Anglo-Saxons. We need have little fear but that this significance will increase and grow more apparent as the years pass. We may look for a steady fulfilment of President McKinley's Prophetic Words:

> Our flag has never waved over any people save in blessing. I believe that the Filipinos will find that it has not lost its gift of benediction in its world-wide journey to their shores.
>
> And when speaking again just after the outbreak of the unfortunate war whose bitterness is now happily almost forgotten: I have no knowledge not common to my countrymen. I do not prophesy. The present is all absorbing to me. But I cannot bound my vision by the blood-stained trenches around Manila where every red drop, whether from the veins of an American soldier or of a misguided Filipino, is anguish to my heart; but by the broad range of future years when that group of islands shall have become the gems and glories of those tropical seas; a land of plenty and of increasing possibilities; a people redeemed from ignorance, devoted to the arts of peace, whose children of children's children shall forever bless the American Republic because it emancipated and redeemed their fatherland and placed them in the pathway of the world's best civilization!



A PROVINCIAL COURT BUILDING IN THE PHILIPPINES.

"Exclusive-Dealer" Agreements*

BY GILBERT H. MONTAGUE

of the New York City Bar

THERE are very few trades, indeed, in which some form of exclusive agreement with distributers does not exist. Such agreements are sometimes based upon written forms of contract. Sometimes they may rest solely upon an oral understanding between the parties. A manufacturer may grant the exclusive sale of his product to a single dealer in a town, or to a single jobber in a given territory, in return for a certain standard of service; or he may offer to sell his goods only to those dealers or jobbers who will refrain from handling the goods of competitors. Again, he may confine the sale of some special product to such distributers as will agree to handle his whole line, and so on. The manufacturer of a number of products in the same general class sometimes parcels them out among the several dealers in a given town, granting to each dealer the exclusive right to sell a particular product. The producer of some single product may sell it to all distributers for resale under private brands, and at the same time give certain jobbers the exclusive sale of the same product under the factory brand. In fact, the forms of exclusive agreement are so varied, and its use is so extensive, that almost every manufacturer or distributer comes at some point into contact with it.

Now each of those forms of agreement, as well as some others which I have not mentioned specifically, has at some time or other been woven into the fabric of a government prosecution for restraint of trade. Some of them have been specifically upheld by the courts, and some have been definitely condemned. Some have been sharply criticized when occurring in one set of circumstances, while the same acts have been declared blameless when they were committed under different conditions. To attempt to ascertain the legality of a particular form of exclusive agreement may seem like trying to locate the elusive pea under the three walnut shells,—much of this whole subject of the anti-trust laws bears some resemblance to that pastime,—yet the manufacturer, and particularly the advertising manufacturer, may find that great consequences depend upon that very issue. No one who has not actually had the experience can understand the dogged persistence with which the government pursues the slightest suspicion that such agreements exist, or the ingenuity that it sometimes exercises in putting upon them the most sinister interpretation.

It may be stated briefly that nothing is calculated to arouse the energies of the Department of Justice more quickly than the suggestion, no matter how remote, that a product is sold on an "exclusive" basis. The cross-examinations which are conducted by the government agents with a view to ferreting out suspected agreements with jobbers or dealers are almost unbelievably vigorous and remorseless. Let me cite one instance which fell under my own observation.

"Exclusive-Dealer" Agreements under Suspicion.

A certain concern had received an application for territory from a jobber somewhere in the Middle West. For perfectly legitimate reasons, this concern did not desire to take on that particular jobber, and yet did not care to offend him. So the president wrote him a nice letter, stating that it had been found advisable to deal only through jobbers who did a certain minimum gross

* Reprinted by permission from the author's recent work entitled, "Business Competition and the Law," published by G. P. Putnam's Sons, New York, and copyrighted by the author, 1917.

business and employed a certain number of salesmen. There were some other conditions, too, of no particular importance, and the whole thing consisted of a rather graceful "turn down," which effectually disposed of the whole matter.

But a year or two later, when the concern was under suspicion of restraining trade, the government discovered the carbon copy of that letter in the files, and straightway demanded a copy of the concern's "agreement" with its distributers. No such "agreement" existed, or ever had existed, yet the government nearly turned the whole organization upside down in the endeavor to find one. The casual "turn down" of an undesirable customer had become a formidable piece of evidence, and the officers of the concern spent many long and perspiring hours with the district attorney before they succeeded in explaining it to his satisfaction.

I mention this incident chiefly for the purpose of showing the importance which the government attaches to exclusive relationships with distributers. We shall find, when we come to examine the court opinions, that they are not always in harmony with the government's notions. But this fact is to be noted: after a few complaints have been made which have even a superficial appearance of soundness, the government is almost invariably certain to put the most sinister construction upon such a relationship. A system of distribution through "exclusive dealers" or jobbers is often the first point of attack and the object of the most bitter condemnation. A special section of the Clayton Act[1] was, indeed, framed for the purpose of emphasizing the importance of this branch of the subject.

Now here again it is necessary to bear clearly in mind the distinction between the view of the government and the view of the courts. There is little doubt that the Department of Justice regards any form of "exclusive-dealer" agreements with foreboding. The courts, however, have not yet been inclined to take such an extreme view, and the conflicts which are so often apparent between the terms of consent decrees and the principles laid down in court opinions are, to say the least, confusing. And this confusion has now been augmented by the enactment of the Clayton Law. Unquestionably the government officials believe that the Clayton Law specifically upholds their views as to "exclusive-dealer" agreements. Thus, according to § 3, "it shall be unlawful for any person . . . to . . . make a sale . . . of goods . . . on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods . . . of a competitor . . . *where the effect of such . . . sale . . . may be to substantially lessen competition or tend to create a monopoly.*" (Italics added.)

But nobody knows exactly what it means to "substantially lessen competition or tend to create a monopoly." Until the courts have had a chance to pass upon it, its meaning is certainly debatable. Without doubt the government will insist upon the strictest possible construction, and it is equally certain that the courts will weigh it in the light of public policy. Just as the Sherman Act, which, when read literally, forbids attempts to monopolize *any part* of trade or commerce, has nevertheless been modified by the famous "rule of reason," so the Clayton Act will presumably be interpreted in such way as to best promote

[1] Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

the public welfare.[2] It is quite futile to attempt to make predictions. The government's first important case under the Clayton Act was filed in October, 1915, at St. Louis, against the United Shoe Machinery Corporation, and a year or two may perhaps elapse before a final adjudication can be arrived at. It is useful, however, to point out that the views of the courts as expressed in a number of carefully considered opinions, under the Sherman Act, are not at all in harmony with the contentions of the government as they appear in consent decrees, in bills of complaint, and in the government's construction of the Clayton Act. Let us examine one of the leading contested cases on this point of "exclusive-dealer" agreements, and compare the reasoning of the court with the claims of the government.

GILBERT H. MONTAGUE.

A Court's View of the Manufacturer's Rights.

The case in question is that of an individual who sued for threefold damages under the Sherman Act against a tobacco manufacturer. The manufacturer sold its products at a certain price to such customers as would not handle competing goods, and charged a uniformly higher price to other customers. It was alleged that this arrangement constituted an attempt to monopolize, such as is forbidden by the Sherman Act, and suit was filed by a dealer who felt that he had been injured by it. In deciding the case, in 1903, the court said: "The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. . . . The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

"The acts of the defendant which are

[2] It is interesting to note that while the Clayton Act apparently forbids the manufacturer to make an agreement with a dealer whereby the latter is restrained from dealing in the goods of competing manufacturers, the act does not prohibit the dealer from making an agreement restraining the manufacturer from selling to competing dealers. In passing the Clayton Act, Congress did not seem to fear that restraint of trade might arise when a dealer prevents his fellow merchants from handling a manufacturer's goods. So far as the Clayton Act is concerned, the dealer can say to the manufacturer: "I will handle your line if you will sell it to nobody else in my trade territory." The dealer can tie up the manufacturer as much as he likes, but the moment the manufacturer attempts to tie up the dealer the Clayton Act steps in.

alleged by the complaint in this section to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employees fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employee had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

"The tobacco company and its employee sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. . . .

"It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated § 2 of the anti-trust act, because it was an 'attempt to monopolize . . . part of the trade or commerce among the several states.' It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by § 2 of the Act of July 2, 1890. . . ? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases,—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. . . .

"It was not—it could not have been—the purpose or the effect of the second section of this law (the Sherman Act) to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of

which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

Is It Right to Favor Exclusive Dealers?

"There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: the sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with or of a duty to him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price, much less at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants, and the judgment below is affirmed."

This doctrine has been several times upheld in the courts. It was affirmed in slightly different phraseology in the Cream of Wheat Case in 1915, where Judge Hough said: "Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offender's trade might be, nor how greatly the general volume of trade has increased during the period of restraint. But *never before has it been urged that, if I. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action.*" (Italics added.)

In the Cream of Wheat Case there was, to be sure, no question of "exclusive-dealer" agreements; and the protestation above quoted was elicited by the plaintiff's contention that the Cream of Wheat Company's mere refusal to sell was in violation of the Clayton Act because inspired by the Cream of Wheat Company's desire to discipline the plaintiff in violation of the anti-trust act for "cutting" resale prices on Cream of Wheat. But if maintenance of resale prices can be compelled by exercise of the right to refuse to sell, then certainly it ought to follow that manufacturers can refuse to fill further orders from dealers who persist in handling rival goods, and by this means can circumvent the alleged purpose of the Clayton Act. In this connection Judge Lacombe's language in the opinion of the circuit court of appeals, confirming Judge Hough's decision above quoted, is particularly emphatic.

"We had supposed," said the judge, "that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. . . . Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet*

reached the stage where the selection of a trader's customers is made for him by the government." (Italics added.)

From this view the government has several times expressed a hearty dissent, and neither the right of refusal to sell nor the legal status of "exclusive-dealer" agreements can yet be regarded as finally settled. The Watchcase decision in a preceding chapter has been contrasted with the Cream of Wheat Case. There the Watchcase company had sent out a circular requesting "that the jobbers to whom we sell our goods shall not deal in any watchcases other than those manufactured by us." In enjoining the company from enforcing this threat against its dealers, the court said: "They were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was *pro tanto* a direct and unlawful restraint of trade."

That an "exclusive-dealer" agreement may be legal if standing alone was intimated by Judge Hazel, in 1915, in the Kodak Case.

"Defendants argue generally," said the judge, "that manufacturers have the legal right to encourage dealers by extra profits or by other fair inducements to handle their goods exclusively; that such an arrangement is to the interests of both; and that the Eastman Kodak Company was the first to induce stationers, druggists, and others to handle its goods as a side line. *All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly,* but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidences of an intention to promote a monopoly." (Italics added.)

The Supreme Court in 1915 expressed the same view, and sustained the validity of a contract for exclusive dealing entered into by a dealer with a glucose manufacturer in consideration of a promised rebate, after holding that the fact that the glucose manufacturer was an unlawful combination could not be availed of in the action. That this system of contracts, along with other contracts of this glucose company, has since been denounced as monopolistic by the district court, in a government suit against the company under the Anti-Trust Act, and the company has been ordered to be dissolved as a combination in violation of the Anti-Trust Act, merely illustrates the now familiar fact that a practice innocent in itself may nevertheless be a link in the chain of a conspiracy in restraint of trade.

What Consent Decrees Show.

This is what the courts show. From this it might seem safe to assume that an agreement with a dealer to handle one's goods exclusively would be lawful, provided the goods are not a necessity of life, that competitors are not restrained from competing with one another, and that the situation is not complicated by other acts in restraint of trade. This involves, however, the further assumption that, as Judge Hough says elsewhere in his decision above quoted, "there is nothing in the Clayton Act"—notwithstanding its language about "substantially lessen competition or tend to create a monopoly"—"to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act;" and this assumption is quite at variance with the notions of the government on the subject. It is conceivable that the doctrine expressed above may still be successfully defended in the courts in spite of the Clayton Act; but unless a man is prepared to stand the expense of a trial, he is likely to be more interested in Uncle Sam's view of the matter. And his view, as expressed in some of the consent decrees, presents some very interesting contrasts to the doctrine laid down by the courts in the decisions above quoted.

For example, we find in the consent decree obtained, in 1914, against some thread manufacturers, that the defendants were perpetually enjoined "from soliciting or exacting from wholesale or retail dealers or jobbers or from customers of competitors in the United States any agreement not to handle or to cease handling the brands of competitors; or from refusing to deal with, or discriminating against, or threatening to refuse to deal with or to discriminate against, those who handle the goods of competitors; or from canvassing the retail trade of any dealer or jobber and thereupon offering the orders thus obtained to such dealer or jobber upon condition that he shall cease to buy thread from a competitor of the defendant or of any of them."

That is pretty sweeping and comprehensive, and so is the decree consented to, in 1911, in the Electric Lamp Case, which provides that the defendants are "perpetually enjoined and restrained from making or enforcing any contracts, arrangements, agreements, or requirements with dealers, jobbers, and consumers who buy from the said defendants either tantalum filament, tungsten filament, metallized carbon filament, or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers, and consumers are compelled to purchase all their ordinary carbon filament lamps from said defendants as a condition to obtaining such other types of lamps, or any of them, or by which dealers, jobbers, and consumers are compelled to purchase any one or more of the above-mentioned types of lamps from the said defendants as a condition to the purchase or supply of any other or all of said types of lamps; and . . . from discriminating against any dealer, jobber, or consumer desiring to purchase tantalum, tungsten, or metalized carbon filament lamps because of the fact that such dealer, jobber, or consumer purchases ordinary carbon filament lamps from others, and are perpetually enjoined and restrained from discriminating against any dealer, jobber, or consumer desiring to purchase any one or more of the above-mentioned types of lamps because of the fact that such dealer, jobber, or consumer purchases any other of said lamps from other manufacturers or dealers."

No comment is necessary on the foregoing. It is evident that the government goes further, to say the least, than the carefully qualified conclusions of the courts in the decisions above quoted. An agreement with a distributer which prevents him from handling competing goods is evidence of the manufacturer's wrongful intent, and he must take the burden of relieving himself from that presumption. However much the courts may have conceded to be still within the positive rights of business men, the government still inclines to its own theory of the matter.

Theory Applied to Direct Sales.

Even with respect to sales direct to the consumer, the government holds to the same theory. Thus, in the petition against some can manufacturers,—a case which is now being contested in the courts,—we find the following accusation: "For the purpose of maintaining control of the market, the principal defendant has induced or compelled its customers to enter into long-time contracts to purchase cans exclusively from it, and has prevented its customers from dealing with such independent establishments as exist, by threats (among others) that if they do so it will cancel the contracts it already has with such customers and will refuse to enter into further contracts with them or sell any cans to them. The effect of such threats and acts is to prevent and restrain dealings with independent can makers."

Again, in the petition in a case against a glucose manufacturer now pending on appeal from a decision in favor of the government, the petition recites: "In November, 1906, just prior to the time that the first independent glucose factory placed its products on the market, the defendant . . . submitted to the trade what was designated as a profit-sharing plan or proposition, and announced that they would set aside out of the profits from the sale of glucose and grape sugar for the last six months of the year 1906 and pay to their customers an amount equal to 10 cents per

hundred pounds on all sales of glucose and grape sugar made to such customers during such period, the payment of the profits to be made on December 31, 1907, on condition that for the remainder of the year 1906, and throughout the entire year 1907, such customer should purchase exclusively from the (defendants) all the glucose and grape sugar required for use in their establishments. The rebating or profit-sharing plan was continued until the year 1910."

It is the practice of the government, when a substantial-looking complaint under the Sherman Act has been lodged against a manufacturer, to place upon him the whole burden of proving that his "exclusive-dealer" relations are free from the taint of a wrongful purpose.

It is interesting to note in the Harvester Case, which is now awaiting a final decision before the supreme court, the breadth of the government's original charges as contrasted with the results of the trial of the case. Although the government won its case in the lower court, none of the charges based on its dealer contracts appear to have been sustained. In its petition, however, which was filed in the district court in 1912, the government laid great stress upon certain "exclusive-dealer" agreements which it regarded as clearly unlawful, and as evidence of a purpose to monopolize the trade. I quote from the original bill of complaint:

"By reason of the fact that defendants manufacture the well-known and standard types of harvesting machines and implements, without which the implement dealer can only with great difficulty, if at all, maintain a successful business, defendants have been, and now are, enabled to compel such implement dealers to enter into (exclusive) contracts of the character described.

"In towns where there are more than one retail implement dealer defendants have adopted, and are now carrying out, the policy of giving each dealer the exclusive agency for a certain well-known machine, such as the 'McCormick' or 'Deering' grain binder or mower, instead of giving to one dealer an agency for all defendants' lines, intending thereby to obtain for themselves the services of all responsible implement dealers, and, by means of the contracts hereinbefore described, to monopolize all trade and commerce in harvesting and agricultural implements.

"Since defendants acquired a monopoly of harvesting machinery, they have expanded into other lines of agricultural implements, and are now engaged in securing a monopoly of those lines, among other ways, by threats to dealers to withhold from them the harvesting implements of the combination unless given special treatment and preferences in respect to the new lines of agricultural machinery manufactured by defendants, or by allowing special confidential commissions on harvesting machinery to such dealers, or by giving unusual credit, or by the exercise of the power given by the annulment clause in the contracts above described."

After a long and protracted trial, not one of those charges of illegality was apparently sustained by the court. But if the International Harvester Company had been a small concern, which had been unable to contest the case, or if it had been unwilling to submit to all the disagreeable publicity which goes with a government prosecution, it would most probably have been compelled to consent to a decree finding the company guilty of all these agreements, and branding all of them as illegal, and restraining the company from continuing any of them. No matter how necessary some of them may have been to the welfare of the company's business, the government's theory of their illegality would probably have wiped them off the slate then and there. That is one of the main reasons why "exclusive-dealer" arrangements should be entered into with the greatest circumspection, and watched with the greatest care and patience. The view of the courts, as expressed in leading cases, gives a good deal of latitude to the manufacturer who wants to protect his product by some form of exclusive contract, but the attitude of the government, with the encouragement it appears to draw from the Clayton Act, indicates that he may possibly have to fight for it.

Business Competition and the Law

By Homer B. Reed, Ph.D.

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THE common-law liberties of competition are rapidly losing their adaptability to the conditions of modern business as conducted by large corporations. In the Mogul S. S. Case, Justice Bowen said that the only legal limitations upon a trader in the conduct of his business between himself and others were the commission of fraud, intimidation by the threat of bodily injury, the intentional violation of individual contracts without just cause, "the intentional driving away of customers by show of violence, the obstruction of actors on the stage by preconcerted hissing; the disturbance of wild fowl in decoys by firing guns;" and "acts merely done with the intention of causing temporal harm, without reference to one's own lawful gain." "But if the real object were to enjoy what were one's own, or to acquire for oneself some advantage in one's property or trade, and what was done was done . . . without any of the illegal acts above referred to, it cannot . . . be said to be done without just cause or excuse."[1] Unlimited price cutting, untruthful boasting about one's wares, deprecating a rival's facilities and insolvency, and soliciting a customer's trade when it is known that he is bound by contract to another, are some of the acts which are perfectly legal so long as they appeal to the trader's self-interest.[2]

THE AUTHOR.

These liberties of free competition are in agreement with the economic theories of a century ago, of which Adam Smith is a classical representative. He assumes a free flux of all the factors of industry. If a laborer fails to secure a living wage, he withdraws his labor or gets another job. If the landowner fails to secure high enough rents or high enough prices for his produce, he either withdraws his land or begins to grow a crop in which there is a scarcity. If the capitalist fails to make a good profit from the sale of his articles, he shuts down his plant or manufactures something in which the demand exceeds the supply. If there were such a free mobility of the factors of industry, the common-law liberties of

[1] L. R. 23 Q. B. Div. 614.

[2] Citizens' Light, Heat & P. Co. v. Montgomery Light & Water Power Co. 171 Fed. 553.

free competition would never produce any serious harm. Excessively low or high wages or prices of production would be very temporary because if one factor deviated from the norm desired by most people, it would be soon forced into equilibrium by compensatory changes in the other factors. But the truth is that this assumed mobility in industry is a fallacy, and with that fallacy the liberties of free competition become equally fallacious. The laborer is not free to quit one job or to get another, because his income does not allow him to cease working, and his habits disqualify him for taking other work. The landowner's land may not be suitable for the growing of the particular crop in which there is a scarcity; and, if it is suitable, the time required to produce the new crop may be too long to avoid starvation. Nor is the capitalist's machinery convertible for the manufacture of just any goods in which there is a scarcity. A gristmill cannot manufacture furniture nor can a railroad company suddenly stop transportation and begin the manufacture of ammunition. While these things are very trite sayings, it does not occur to many that they absolutely destroy the justice of the so-called liberties of free competition.

But the chief difficulty with the economic theory on which the common-law rights of competition are based is that it ignores the striking fact of modern industry that the supply of goods is controlled by human agencies in the form of combinations. Industrial combinations may buy up the major sources of supply and refuse to put the goods on the market for less than a fixed price. They may control the transportation facilities of a certain article and limit the quantity accepted for transportation to such an extent that the available supply is always scarce enough to bring the desired price. Or they may buy up the available supply during a period of overproduction, store it away until a season of scarcity arrives, and then market it only in such quantities as bring the prices demanded. A labor combination may control the rate of work so that the supply of labor is always somewhat under the effectual demand, or it may suddenly withdraw its labor when the demand for it is critical, and produce the required amount only on the condition of a permanent rise in wages. The free and voluntary efforts of such agencies thus produce prices which to call "free," or "justly fixed by the law of supply and demand," is merely to make a play on words.

The rules of the common law on competition secure social justice only in an industrial society where the traders are small and approximately equal in capital. They were developed in such an industrial order, and produce havoc when taken out of their setting. In a small town, where no trader has a great deal more capital than another, a war of competition benefits the public principally in the way of "bargain sales." Few traders are driven to the wall, for the largest usually is not able to sacrifice enough capital to clear the market of rivals. Business success depends not only upon capital, but also on initiative, prompt service, fair dealing, and a host of other qualities which make a man a valuable member of society. But when a combination, say of grocers, starts a competing store alongside of the local corner grocer, they can drive him out of business in a short time because of their superior capital alone, and not because of their greater superiority in any other quality; *e. g.*, their ability to satisfy customers. The public has now lost the benefit of a valuable trader and suffers the hardship of monopolistic prices. When a judge justifies competition of this sort on the ground that "competition is the life of trade" and that it is "good public policy," he is unconsciously basing rights on the single element of capital, and wholly ignores those other elements of success which make the laws of competition right in one industrial order and wrong in another. It is this very weakness of the law which is responsible for the existence of most of our monopolies. The combinations which established them did nothing but carry to the bitter end the laws of competition. In other words, they carried on their business according to the laws of competition developed in an industrial order of approximately equal individual

traders. In the latter industrial order, these laws are just enough, but in the former they lead to a monopoly which is always an oppression to the public. It is this transference of the laws of an individualistic industrial order to a combinational industrial order that is the source of most of our industrial troubles in so far as they concern the common good of society in a legal way.

I have shown under what conditions the common-law rules of competition are to be approved on grounds of public policy. There are, however, certain logical and legal arguments by which the rules of competition are supported. One of these is that a combination may lawfully do what an individual may lawfully do. The number combining to do a legal act cannot affect its quality. This principle has been made the ground for approving the action of a combination of retail dealers for preventing wholesale dealers from selling to persons not members of the combination, the discharge of the members of one labor union because of the threat of a strike by another labor union, and the picketing of the shop by the members of a labor union which had declared a strike on that shop. The principle in the question sounds logical enough, but would it not be equally logical to say that because it is good to drink one gill of wine for your stomach's sake, it is also good to drink a combination of gills for the same purpose? The number of gills combined cannot change the quality of the effect. As a matter of fact, the number combined does change the quality. This is true of individuals as well as of gills of wine. The effect cannot be determined by *a priori* reasoning, but only by a careful observation of the facts. So the justness of the principle that a combination can conduct a business in the same way as an individual cannot be determined by logical reasoning, but only by a careful study of the effects which these business methods, as practised by combinations, have upon the welfare of society.

Another argument supporting competition was made by Judge Brannon in a West Virginia Standard Oil Case. It runs in part as follows: "The lion has stretched out his paws and grabbed in more prey than others, but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords the right; it is given him by the Maker for existence. . . . That in these days of sharp and ruinous competition some perish is inevitable. . . . Has it not always been so? . . . What its evolution will be in the future we do not know, but we do know that thus far the law of the survival of the fittest has been inexorable."[3] Judge Brannon no doubt speaks a widely believed opinion when he affirms that predatory competition is a part of the natural order of things, and cannot be changed by the direction of intelligence and will. But it is a sufficient answer to say that he unconsciously bases rights on mere physical force regardless of its effects. If this is just, we can say that since the state has more physical force than any business combination, it has a right to destroy it.

If we once agree that a combination cannot do business in the same way as an individual, a principle that was affirmed in the Massachusetts case of Martell v. White, 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085, 64 L.R.A. 260, then we are in position to appreciate the restrictions which have been made upon competition by the legislatures and courts in recent years. An example of these restrictions is contained in an injunction entered in the case of United States v. Bowser & Company. The defendants were enjoined from making false representations about competitors; threatening non bona fide suits for infringements of patents; hiring or bribing individuals or public officers; procuring information from competitors' employees; hiring persons to secure the addresses of competitors' customers; securing cancelation of orders secured by competitors; promising to indemnify customers from losses of litigation from breaking contracts with competitors; reducing the price of their product below cost of production, or giving it away, or discriminating in price between different persons or localities with the intent to injure competitors;

[3] 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L.R.A. 804.

hiring away the employees of competitors; and committing any other similar acts of unfair competition. Further and other limitations have been put on competition by the Clayton Act and by the Federal Trade Commission Act, which authorizes the Commission to bring proceedings against any corporation using an unfair method of competition, if it shall "appear that such a proceeding . . . would be in the interest of the public." The wide departure of these measures from the traditional policy of the United States and from the rulings in the Mogul S. S. Case is fully justified because of the fact that a combinational industrial order of society demands rules far different from an individualistic industrial order. These measures leave much to be desired, but they are certainly in the direction of a policy which alone can solve the problems of competition; namely, that of putting the business of large industrial combinations under the public service laws. Among other things, this means the public control of the prices of monopolistic products, and inability on the part of the combination to select its own customers. The permission of the latter in the Clayton Act is one criticism that I would make against it, because it will prove to be a cover for a multitude of sins in the way of competition. Another difficulty is that it does not tell us what is meant by the phrases, "to substantially lessen competition," or "to tend to create a monopoly." I believe that eventually these can be defined by reference to the principle that calls a price or a business method fair in so far as it establishes a business yielding fair profits above cost of production. But in any case, the law is not a thing unto itself, and can only be made to secure justice if developed closely in connection with present day economic and social conditions.

H. B. Reed

Playing Soldier

I once watched a traffic man raising his hand
And bringing the horses and wagons to stand,
While at his gesture all waited—and so!
Crossing ahead came a proud little show;
Ten boys they were with a flag, fife and drum—
Ten boys, the one with a flag was my son,—
Playing Soldier—

Gallant he fought in those little boy days,
Planning maneuvers in little boy ways—
Holding his yard from invasion! I seem
Now to look back on it all as a dream.
Still I can see him, his fair hair awry—
Holding the flag up, with fight in his eye—
Playing Soldier—

Years have gone by—my lad has his chance;
Now he is over there, "somewhere in France"
"Somewhere in France"—that impish young boy,
Dear God, I love him!—My pride and my joy.
Help his lone father to fight, just the same—
Fight with the joy of a son "in the game"—
Playing Soldier—

Margaret Yandes Bryan.

Judicial Partition of Water Powers

BY GEORGE P. DECKER

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THE complications accompanying the draft of water by more than one user from the same fall or pond, where as between themselves they may be entitled to certain proportions of the flow, are great. Water resents the presence of any structures interfering with its natural flow. The flow is always limited. The needs of each of several users vary from day to day. Separation of the flow into predetermined fractions is always alone a difficult task, and may only be approximated. Neighboring millers at the same fall are under constant suspicion of each other as gate tenders. As a result groups of such users, regardless of whether any of the members had been guilty of unfair practices, have resorted to courts of equity to procure decrees redefining the rights of each. The several shares were created usually at different times or by different grantors, and so were defined in different, and often in vague, terms. In applying to the courts they asked that some newer and uniform phrasing be substituted, and for judicial supervision over the use. One user consented to take the role of a plaintiff, while the others became defendants in form, but indorsed the application. In such case the defendants are in truth but coplaintiffs, and the proceeding, in its nature, *ex parte*. A recent illustration of this is seen in Carthage Tissue Paper Mills v. Carthage, 200 N. Y. 1, 93 N. E. 60, where the court says (p. 5):

> The defendants by their answers united in the prayer that the water rights of the respective parties should be admeasured as to quantity and settled as to priority, and that all owners be restrained from using more than his share.

Consent of all parties could not, of course, confer on the courts jurisdiction over subject-matter, and jurisdiction would not be attacked by parties who had asked the court to do these things. In New York this jurisdiction has never been passed upon as a litigated point in a reported case until the recent one, Tracy Development Co. v. Becker, 212 N. Y. 488. Appeals in these friendly cases have only been taken where there was dissatisfaction as between one party and another over the shares as thus fixed. But if jurisdiction did not exist, decrees of this sort have constituted, in law, mere awards, and the judges who directed the decrees were only arbitrators. Such decrees were binding only to the extent that they constituted awards founded on agreements between consenting parties. This practice of judges in entertaining such cases has, however, given rise to a widespread notion that, in equity courts, there is a judicial jurisdiction to declare the mere rights of parties and to supervise enjoyment thereof. The judgments so rendered in water cases have been called partition decrees.

In the absence of an open charge by a plaintiff against a hostile defendant that the defendant has actually invaded a legal right of the plaintiff, a dispute between the two, as to their rights, brought before a court, is not only academic, but is not justiciable. Moreover, when a real inquiry is threatened, unless it would be of irreparable nature, it is the rule that courts of law must be resorted to in the first instance for judicial redress. While the law may offer a remedy for every wrong, it does not offer a judicial remedy for escape from every difficult situation.

Let it be assumed then, for the purposes of this discussion, that an absolute private property right may exist entitling a private landowner to divert a stream from its natural bed within his own land lines. Any such right, when still re-

tained in the owner of the land, will, unless reserved, pass by deed of the land. But this right is severable from other rights of use of land, and, by an appropriate conveyance, the landowner may devest himself of it, as he may of the right to raise wheat or to mine on the land, and for a short time or for eternity.

If the duration of the grantee's term is short, his right may become a personal one for all purposes of further transfer, of inheritance, and taxation, as is the case with usual short-term land leases. If the term of the grantee is long, it may, for certain purposes, be classed as real property by force of statutory definitions.

Any existing rights to divert shares of stream flow are traceable usually to such a conveyance made by a landowner who, at the same time, retained title in the land over which the stream naturally flowed. If the grant of a certain share of flow was made to several joint grantees, or if it accrued to several by subsequent grant or otherwise, their right of diversion, undivided as between themselves, is no more partitionable by the courts than the undivided right of joint lessees of any other limited right to use land. The act of diversion is a continued use of the grantor's land, because an interference which intercepts a flow which would naturally wash that land. The right to divert water away from the grantor's land to the grantee's land is well described as a negative easement in the grantor's land.

When water diverted under such a right is led to a mill on a site owned by the one who diverts, the right to divert does not become thereby an appurtenant to or parcel of the mill site. Lawrence v. Whitney, 115 N. Y. 410, 22 N. E. 174, 5 L.R.A. 417. The owner of the mill in selling the mere mill site does not part with the diversion right. His deed, however, may indicate a different intent. He is not required to expressly reserve the diversion right in order to retain it when he sells his mill site.

The original grantor of the diversion right may, and in case of a large power usually does, make several fractional grants of the whole fall. To each grantee he may also sell a separate mill site. By such grant the extent of the water share is fixed and title to the share bestowed. The grantee is satisfied as to both by accepting the grant. His grantees in turn must be content with the original definition used.

Several grantees of as many shares are likewise concluded as between themselves as to definition of rights. Such a grant may not be reformed a hundred years later by the courts at the instance of a recent purchaser of a share so created. If the original grant defines the share as water sufficient for two runs of stone, that is the volume the new purchaser gets subject to prior rights in time of low-water flow.

Where a court of equity affords injunctive relief in water-power cases against wrongful practices, it does not, in contemplation of law, divide a power already held in severalty. Where right to use a single fall is already divided, through grants, a court of equity may take proof as to what those shares are, and, in a proper case, enjoin the parties from exceeding the limits of their shares. Such a proceeding is not a dividing of the power into shares.

Because the grants as made may describe the shares indefinitely, and they often do, jurisdiction to repartition the whole fall does not arise. A court has no power of itself to create or give title to a share by decree. The existence of innumerable shares or fractional rights in a given fall may create a situation where beneficial use of the shares becomes impracticable and their value nothing. Those who create such a situation had the right so to do. A situation lawfully arising as a result of grants or of inheritances cannot constitute a nuisance, nor do the several share owners become wrongdoers because they happen to own shares worthlessly small.

The raising of water to a head requires continuous expenditure of effort to maintain the necessary dam because nature is ever at work to carry it away. Division of the water into many races is a similar burden because the stream is ever at work to be reunited. The owner of a simple right to divert a fraction of the flow may not compel another to

consent that such structures shall be maintained or to help to maintain them. Obligations to do such things can arise only out of contract, express or implied, and voluntarily assumed. Where these exist, equity courts are sometimes called upon to enforce performance, or, by injunction, to prevent the breach of them. Bardwell v. Ames, 22 Pick. 333.

The original grantor may covenant that he will maintain a dam and other structures for a given term or in perpetuity. In either case it is common for equity courts to be called upon to enforce or protect the rights of the grantees, not because it is water power that is involved, but because the situation may be one where remedies at law would not be adequate for the protection of the interests dependent on observance of the covenants.

The setting apart by decree of portions of a parcel of land adjusted in size to the value of the undivided shares of different persons holding title to the whole, and where such portions are described by metes and bounds based upon surveys and plottings, is instantly effective. No driving of stakes or building of fences is essential to effectuate the partition. As much may not be said of a decree which purports to divide stream flow into shares even in a case where the right to use the stream flow had never been subdivided by grant among parties jointly entitled to the whole.

A decree merely declaratory of the fractions of flow each party is entitled to accomplishes nothing, but leaves the parties exactly where they were before coming into court. De Witt v. Harvey, 4 Gray, 486; Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378, 33 L.R.A. 61.

An attempt by a court to take charge of and administer over use of water power, except during pendency of an action concerning it, violates the fundamental limits of judicial power. Courts have no inherent power to compel construction or reconstruction of hydraulic works. McGillivray v. Evans, 27 Cal. 92, 11 Mor. Min. Rep. 209; Brown v. Cooper, supra. Courts have no power to compel unwilling parties to expend their means in supposed improvement of properties. If there are joint owners, the desire of one for improvements does not create the right to compel others. Courts have sometimes done these things where parties did not object, and have done them where they actualy consented (Sanborn v. Braley, 47 Vt. 170), but that the power exists in the judiciary is denied unequivocally in a leading case (Field v. Leiter, 117 Ill. 341, 7 N. E. 279). In that case the practice of doing these things, which it was assumed existed in England (Warner v. Baynes, 2 Ambl. 589, 27 Eng. Reprint, 384), is condemned as un-American. Field v. Leiter is followed approvingly on this point in Brown v. Cooper. Courts have jurisdiction to take over the management of private property while a litigation concerning it is pending. They cannot do so in perpetuity, as partition decrees have sometimes assumed to do. The origin in the United States of the doctrine that the courts can do so seems to be the New York case, Smith v. Smith, 10 Paige, 470, where Chancellor Walworth, without any discussion of the point at the bar, so far as the report shows, and where the question of jurisdiction had not been raised on the record, said that his court could properly do these things. That declaration of the learned chancellor has been so often cited, and so unquestioningly, because of his eminence, that the case deserves analysis.

One Smith, the father of the parties to the suit, had owned land through which coursed a stream. This he had dammed, and he had erected a mill on each side. He conveyed to plaintiff the land on one side with its mill, together with an undivided half of the stream bed, pond, and dam. On the same day he conveyed the land on the other side to the defendant with its mill, together with an undivided half of the stream bed, pond, and dam. Plaintiff, as he had a right to do, whether he had or had not quarreled with his brother over use of the water, brought action for partition. The court had undoubted jurisdiction to effect partition of the land under the stream, pond, and dam, either by actual division of the land owned in common, or by sale of it. The vice chancellor had held that this land was not suscep-

tible of actual division without destruction of its value, and that it must therefore be sold and the proceeds divided. At the time, hydraulic use was probably the most valuable use of the pond property. In overruling the vice chancellor, the chancellor decided that the pond could be divided into two separate shares, and that, to preserve its value for hydraulic purposes, each share could be charged with an easement in favor of the other for maintaining the dam for hydraulic purposes for the equal use of the two parties. Then he held that the court could direct the erection of monuments to mark the levels of the water, following, for his authority, Warner v. Baynes. He said that the court could make any arrangement between the parties which they would have been competent to make by contract or covenant between themselves. The doctrine thus expressed has been followed in many friendly suits, and permeates judgments since rendered, especially in water power cases. The correctness of the chancellor's view has never been upheld in any case where the question of jurisdiction was raised on the record. Those views were expressed by him by way of advice to the court below as to what it had the power to do. Whether the advice was successfully followed in that suit, and, if so, whether any of the parties objected to such an extension of judicial control of their property, if it was attempted, does not appear in the reports.

In Janesville Cotton Mfg. Co. v. Ford, 55 Wis. 197, 12 N. W. 377, the court upheld the power to appoint officers to represent the court in administering over a water power between several users. The court intimated that such a jurisdiction would exist independently of legislation bestowing it on the court, but that decision was based, nevertheless, upon such a statute enacted in Wisconsin. The case is not an authority where no such statute exists, even though a legislature may itself exercise, or may bestow, such an authority upon other departments of government. That a legislature may do either, under the usual constitutions adopted in the United States, may well be doubted.

In Brown v. Cooper, supra, the court expressly rejects the suggestion that it has the power to appoint an inspector to oversee the administration of a water power, and (following Field v. Leiter, supra) says of such proposal:

> It is taking the management of the property out of the hands of the joint owners and placing it in charge of an officer of the court. . . . Such an order would be an infraction of the rights and practices which are guaranteed to us by our form of government. It is a blow at the liberty of the individual, and does not comport with our ideas of the rights of property.

Farnham, in his work on Waters, vol. 2, page 1599, says:

> The appointment of a supervisor to divide water, keep up weirs, and otherwise oversee the property for the general benefit of the owners, is beyond the power of the court.

In the western domain, organized into states whose prosperity depends largely upon irrigation, provision has been made in their organic law to supersede the English common law by a rule vesting in first appropriators the proprietary right to divert and consume stream flow for irrigation. In such states there may be a necessary governmental jurisdiction to supervise the draft of flow in the order of rights so acquired, as the population of a whole watershed may be affected by the unwarranted act of one user. But if such jurisdiction inheres originally in the judiciary rather than in the legisture, then courts have come to possess powers hitherto unrecognized in established law.

When several persons have separate rights in a single fall, and one has wilfully invaded the rights of the others in the draft of water, an injunction, duly enforced, may be said, in a loose sense, to effect a partition of the power. Such use of the term "partition" has been misleading. When real property contains a stream with a fall available for power, the land, if held in undivided shares, may, of course, be partitioned by the courts, under the usual form of action as though there were no water on the land. Such suits are not uncommon. The following are illustrations: Miller v. Miller, 13 Pick. 237; Smith v. Smith, 10 Paige, 470; Higginbottom v. Short, 25 Miss. 160, 57 Am. Dec. 198; Cooper v. Cedar Rapids Water Power Co. 42

Iowa, 398; Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378, 33 L.R.A. 61.

In such cases it frequently happens that the chief value of the land lies in the water power. That fact may properly control on the question whether a parting of shares into specific parcels of land, divided by metes and bounds, shall be had, or a sale of the whole made and a division ordered of the proceeds. Whether the court should refuse a sale, and partition the property, setting off rights to fractions of the stream flow, has given the courts much trouble. Certain cases hold that the whole property should always be sold if any party so demands (Brown v. Turner, 1 Aik. (Vt.) 350, 15 Am. Dec. 696; Higginbottom v. Short, 25 Miss. 160, 57 Am. Dec. 198; McGillivray v. Evans, 27 Cal. 92, 11 Mor. Min. Rep. 209), other cases hold that the land may be divided and the power separated in kind (Smith v. Smith and Cooper v. Cedar Rapids Water Power Co. supra).

Where courts have in such cases decided to award fractional rights in the use of a water power to the plural owners of the land, they have usually provided in the decrees as to when and how each share of water is to be drawn, and that the parties shall be chargeable in perpetuity with contribution to the expense of maintaining the dams and structures essential to make the power available, and have declared the charge a lien on each separate parcel set off. In such cases it is often to the interest of all parties that they consent, and they have consented, thus removing the question as to judicial power. Assuming that the court, as an incident of the right to effect equality of partition of undivided lands, has the power to charge separate parcels set off, with a perpetual encumbrance to make possible a continuance of some special use of the land, it does not follow that such encumbrances may be created by the courts against land already belonging to the parties severally in divided ownership, as in case of two mills. This has been done by decree, nevertheless, in New York in cases where no objection was made, but in cases arising many years ago in lower courts and not reported. The power from certain dams at Rochester and at Fulton, New York, has been so treated.

Where no undivided title to land exists, the courts have no power to divide the use of a water power arising from an adjacent fall, subject to the use of several persons jointly, into several separate rights. Courts may not dictate that such water shall be used according to the court's view of highest usefulness, and proceed to charge unwilling parties with expense to preserve such usefulness. It often happens, under water rights acquired by deed or acquired by prescriptive use, that the right consists of an easement, without complete title to the servient land, as for flowage or a raceway, or of a negative easement, against lands of others, to prevent the water flowing down them in its natural channel. Chancery never possessed any jurisdiction to partition a mere easement, even though the easement itself might be held by several under rights undivided as between themselves. Code actions do not usually extend to partition of easements. It has seemed wise to the legislatures of two states, where water power is an important utility and exists abundantly, to provide an authority in the courts for partition of mere water rights when owned by several in undivided shares, as may often happen in the case of copartnerships or under wills. Massachusetts has done so (Mass. Laws 1854, chap. 74; Mass. Rev. Stat. chap. 184, § 58; see De Witt v. Harvey, 4 Gray, 486). That case says that in Massachusetts, before that statute was enacted, mere easements for dams and pondage to perpetuate water power developments could not be divided by the courts. Wisconsin has enacted a similar statute (Rev. Stat. §§ 3149–3153; see Janesville Cotton Mfg. Co. v. Ford, 55 Wis. 197, 12 N. W. 377). To say that the courts may partition a flowing stream into separate parts by mere decree is to confuse thought on the subject despite those statutes and decisions, for flowing water does not obey court decrees. A stream is partitioned only when, by appropriate dams and races, it is actually split into independent streams. Stream partition by decree is no partition. De Witt v. Harvey, supra. Be-

cause injunctions have been awarded in favor of one user of power against another using from the same pond and guilty of some wrongdoing, unwarranted inferences have been drawn as to jurisdiction of courts to partition use of water. It is not improper that an injunction order should recite the true rights of the party enjoined and forbid him to exceed them. But a state of chronic suspicion and dispute between water-power users does not entitle some of them to injunctions against the others.

As a general rule the facts justifying injunctive relief must reveal the existence of what the law regards as a nuisance. But every situation which might to one man seem intolerable or a nuisance, in the popular sense of the term, is not in law a nuisance. Olmstead v. Loomis, 6 Barb. 152.

The court in that case says:

> It is not every violation of another's rights which may be ranked in law under the general head of nuisance authorizing the interposition of equity courts.

That case was reversed (9 N. Y. 423) because the New York court of appeals considered that the drawing of more water by one user among several from the same pond than he was entitled to draw was the commission of a nuisance. In that case, however, the defendants had admitted facts sufficient to show not only that they were drawing water to which they were not entitled, but were doing it through their own fault.

The court of appeals cited Gardner v. Newburgh, 2 Johns. Ch. N. Y. 165, 7 Am. Dec. 526, as its authority on the point. Jurisdiction has generally been assumed by courts of equity to exist if a complaint charged any sort of interference with a stream of water. That such interference would constitute a private nuisance is also usually gratuitously assumed. The distinction between the facts involved in the Newburgh case, and the facts common to disputes between water-power users from one pond, seems never to have been clearly pointed out.

The Newburgh Case arose in 1816 on motion for a preliminary injunction, which was granted by Chancellor Kent. The suit was brought to procure a permanent injunction to prevent the village from accomplishing a threatened wrong, for it had commenced construction of works adapted to divert a certain stream. The village needed a public water supply and the trustees were making ready to divert from its channel the stream at a point above the plaintiff's land, and through which land it naturally flowed. It was not a case between parties using, or entitled to use, from the same point or from the same pond. The village rested its claim to the right to divert on a special statute, which purported to give it. The statute contained no provision for compensation to those who might be injured, and the trustees, failing to come to terms with the plaintiff, proposed to ignore his rights. The court, as well it might, held that as against the plaintiff the statute was unconstitutional; and the threat of the trustees, a fact duly alleged and not even denied, was treated by the court as a threat to commit a private nuisance under the well-known rule that the wrongful diversion of water by one person away from the land of another, over which it would naturally flow, is the commission of a private nuisance. The difference between that case and the many cases which have erroneously followed the Newburgh Case is that in the latter case there was no concurrent right of use in all the parties, of stream flow from the same point. The abstraction of any water from the stream by diversion from its natural bed by the village was confessedly wrongful as against a landowner below; and the threat to do it, a threat to do a wrong.

The Newburgh Case has been used to uphold jurisdiction in later cases involving streams of water, but for no better reason than because a stream of water was involved in that case and because plaintiff there got judgment.

The higher New York court, in reversing the Olmstead Case, attempted to establish the rule that a mere state of disputation between many users over rights in the same pond may be treated as a legal nuisance, entitling any one of them to resort to equity courts before resorting to the law courts to establish their rights and the fact of a violation thereof; that equity judges have jurisdiction to prevent "continual irritation" (p. 431).

The court failed to justify any such boundless and revolutionary extension of judicial powers. Its decision has been cited since by the same court but once (Mudge v. Salisbury, 110 N. Y. 417, 18 N. E. 249) on the point on which it reversed the Olmstead Case. On three other occasions the same court has followed its opinion for reversal (Groat v. Moak, 94 N. Y. 126; Hall v. Sterling Iron & R. Co. 148 N. Y. 438, 42 N. E. 1056; Carthage Tissue Paper Mills v. Carthage, 200 N. Y. 12, 93 N. E. 60), but followed it on a point on which it did not reverse. The opinion of the general term in the Olmstead Case, holding against the existence of concurrent jurisdiction of equity and law courts in nuisance cases, has, on the other hand, been respected as few judicial opinions have ever been respected in this country. It was followed by the New York court of appeals itself in Pennsylvania Coal Co. v. Delaware & H. Canal Co. 31 N. Y. 91, on the very point on which the same court had previously reversed it. The general term followed itself when it decided Fisk v. Wilbur, 7 Barb. 395, although this was before its former decision had been reversed. The highest courts of other states followed the general term decision in the Olmstead Case, years after the New York court of appeals had reversed it. Jordan v. Woodward, 38 Me. 423; W. H. Howell Co. v. Charles Pope Glucose Co. 171 Ill. 350, 49 N. E. 497. The United States Supreme Court has followed that general term decision since the reversal of it and on the very point on which it was reversed (Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 545, 17 L. ed. 333). The soundness of the view of the general term is thus established beyond successful dispute.

Where a threatened act would be wrongful and the consequences irreparable by legal remedies, equity courts have jurisdiction whether the threatened act relates to the use of water or to dry land, or where it has no relation at all to real estate. There is no reason for existence of a jurisdiction in equity courts in respect to water uses which is different in principle from the reasons for jurisdiction in respect to dry land. Burnham v. Kempton, 44 N. H. 78. Whether a case involves water or dry land, the question of jurisdiction of equity courts, in case of alleged nuisance, is whether the injury would be irreparable at law. The mere draft by one of many users out of the same pond, of more than his just share, is not the committing of a nuisance. Fisk v. Wilbur, supra. Something more must be shown to justify intervention of a court of equity. Cases holding to the contrary are Bardwell v. Ames, 22 Pick. 333; Emery v. Erskine, 66 Barb. 9.

When the court said in the latter case that it was as much a nuisance for one shareholder to draw more water than he is entitled to draw, as it is to draw any water where there is no right whatever to draw, it is apparent that the court was using the term nuisance in a free, rather than a legal, sense. It would be unwarrantable to extend the legal term to include every annoying situation that any person may ever encounter. Such a definition would extend equity jurisdiction over every conceivable conflict between men, and subject their every act to supervision of the judiciary. One judge dissented in Emery v. Erskine. The prevailing opinion cites Angell on Watercourses, § 388, but the reference contains no line sustaining the writer of the opinion.

If in Bardwell v. Ames a nuisance had been committed, jurisdiction existed because in Massachusetts equity courts have jurisdiction by statute in all cases of nuisance, concurrently with law courts. The opinion says that no question was raised by the parties at the trial as to the jurisdiction of an equity court over the case.

It is entirely possible that more than a certain mathematical share may flow to a mill wheel, with no fault on the part of the owner of that wheel. It may be his own fault if for a time he does not get his share. Two millers know this when they build a joint dam or when they buy shares in a power already developed.

It has been a settled belief in this country that a property owner may, if he likes, suffer his property to remain unproductive; his buildings to decay; use his property for such lawful purposes as suit himself, and change from one use to

another; that the courts have nothing to say in these matters. The case of Warner v. Baynes implies that a different doctrine existed in England. That was a chancery case in which Lord Hardwicke, the chancellor, in a partition suit in 1750, by decree, provided for continued maintenance of a bathing establishment on the land and for qualified partition subject thereto. This was done over objection of the owner of a share, who demanded a sale and division of the proceeds. That no such judicial jurisdiction exists in this country is well pointed out by the Illinois supreme court in Field v. Leiter, 117 Ill. 341, 7 N. E. 279, wherein it is shown, after considering Smith v. Smith, that such a jurisdiction would infringe upon the rights of private property as they exist here, whatever the rule may have been in England. In England a contrary doctrine may have contributed to sustain a policy of land tenure which encouraged entailment in perpetuity. That policy was abolished here, and since 1750, when Warner v. Baynes was decided. That American courts have no such power has been determined in McGillivray v. Evans, 27 Cal. 92, 11 Mor. Min. Rep. 209; Warren v. Westbrook Mfg. Co. 86 Me. 32, 29 Atl. 927, 26 L.R.A. 284.

A power to say for what purposes private property shall be used by the owner is anything but judicial. If it has been added to judicial jurisdiction, then, although judges refrain in practice from exercising it when all parties to be affected object, there would seem to be no reason why judges would not have the right when all parties object, for the power must be justified in any case on the theory that judges are wiser than a property owner as to what is good for the property owner. The judge himself then would act at his discretion if he refrained from dictating in particular cases. The whole foundation of jurisdiction to partition property owned in common is to enable each share owner to do what he wishes with his share.

The situation of a numerous group of men with rights in severalty, to share in stream flow from the same pond, and where the subdivision has occurred either by grant or otherwise and where the shares have become too small for advantageous enjoyment, is no different from that of a group of heirs of the same parcel of land devoid of water. In the latter case, continuance of such a situation is recognized as impracticable and unprofitable. Holders of small shares sell out accordingly to some common purchaser. Where analogous situations arise in respect to the use of a single fall of water available under proper circumstances for profitable hydraulic use, the courts should not consent to act, even by proxy, as policemen to control the use from day to day and at the instance of one against the will of others, or even with the consent of all concerned. That certainly is not judicial service.

Every person who deliberately buys a right to a share of stream flow is bound to know that he is buying an uncertain energy because of the variation of the flow from season to season and from day to day, and that a constant and probably increasing demand upon his part for power cannot be supplied by a limited and inconstant supply. Seneca Woolen Mills v. Tillman, 2 Barb. Ch. 9.

Injunctive decrees have been made in water-power cases where jurisdiction was conceded to be questionable. In Warren v. Westbrook Mfg. Co. the court admitted that its proposed decision would be a departure from the conservative course in reference to jurisdiction in equity cases which the supreme court of Maine had previously pursued. The departure was supposed to be excusable in view of the exigencies of the particular case before the court. On this point the court said, referring to the long period during which the suit had been in litigation:

> It would be a reproach to our jurisprudence if the court did not possess and exercise the power to authoritatively adjust these differences. The alternative would be destructive competition in the use of the water.

That view coincides with the one expressed by Chancellor Walworth in New York in 1829 in Arthur v. Case, 1 Paige, 447, where the owners of opposite riparian lands at the outlet of Lake George had deadlocked. As to the power of the court of chancery he said:

> The regulation of the use of water upon the different sides of a stream for hydraulic purposes is so essential to manufacturing interests of our country . . . that it would be deplorable if these important establishments could be destroyed by combinations of persons, and the owners left to seek an uncertain remedy in a court of law.

Courts pass upon rights in order to reach some judgment or decree awarding damages or equitable relief which the court has jurisdiction to render in order to right a legal wrong actually committed, or to prevent one threatened. Separate owners of the opposite banks of a stream are not obliged, at the peril of having the courts take charge of their properties, to enter into an agreement with each other for joint development of the power or for extending perpetually a temporary agreement so to do. They do agree to do both so often, however, that the practice has been taken in other cases as evidence of a duty.

It is well understood that use of water power by a private individual for manufacturing for private profit constitutes a private use of land or water. To enable him to do this, he may not exercise the power of eminent domain. If courts of equity may coerce one riparian owner or one shareholder in land at the instance of another to suffer his property to be so used, then these courts may, by this indirection, bestow on the party who invokes them, in such a case, the precise advantage which the law of eminent domain confines to cases of public uses. By express statute courts in certain states may construe wills for information of interested parties who are in doubt. In certain states, where legislatures are in doubt, courts have, by express provision of constitutions, authority to determine whether proposed legislative bills would be constitutional. In absence of such statutes, courts would treat these questions as academic. In Massachusetts, under the Act of 1854, in De Witt v. Harvey, 4 Gray, 486, there is an express jurisdiction given to the courts of equity to apportion or define mere rights in water. No such jurisdiction exists, however, by statute in many other states. None exists in New York. It is a common occurrence for two water power users to quarrel over the meaning of deeds granting shares in inapt terms.

Fisk v. Wilbur, 7 Barb. 395, was a suit in equity to ascertain and declare the rights of quarreling parties in certain water privileges. On application for a rehearing after the complaint had been dismissed in the former court of chancery, the general term was unanimous in refusing a rehearing. The opinion said:

> There is an erroneous impression prevailing among the profession in relation to the powers of this court in cases of this kind; *viz.*, that it is the peculiar province of a court of equity to construe contracts and covenants of water powers to define the quantity of water granted or reserved thereby.

That case has been followed approvingly in five jurisdictions:—

> Philadelphia v. Spring Garden Comrs. 7 Pa. 348; W. H. Howell Co. v. Charles Pope Glucose Co. 171 Ill. 350, 49 N. E. 497; Burnham v. Kempton, 44 N. H. 78; Patten Paper Co. v. Kaukauna Water-Power Co. 70 Wis. 659, 35 N. W. 737; Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 545, 17 L. ed. 333.

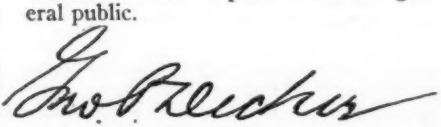
Many states, either by sufferance, by general or by special permissive statutes, have authorized private utilization of hydraulic power in the development of industry along nearly all streams. Certain early decisions dealing with use of these water powers, rendered in suits between private users, indicate that the courts believed it to be a judicial duty to reduce these uses to an orderly system. In the granting of these privileges the legislatures had omitted to provide administrative supervision. Private landowners, in granting fractions of their falls, had usually omitted to provide for anything of that sort. Partition decrees when asked for were then made by the courts, supervisors appointed, and the salaries for that service fixed and charged by the courts as liens on the lands of the parties. The parties gave assurances that strife between them would be thus ended, and could be in no other way; that industry must halt unless this foundation of it was taken in charge by the courts. All concerned were ready to recognize the decrees as finalities. Quite the opposite result, however, proved true. Decrees made in 1850 based on partition of flow in defined terms of "stone runs" were unsatisfactory to the next generation, and new decrees demanded in terms of volume and head of flow, or the further subdivision of

shares, inevitable from sales and deaths of owners, required periodical readjustment of decrees. If copartners holding a diversion privilege quarrel and dissolve, and the courts are called upon, that privilege will be ordered sold and the proceeds divided, as would be the case with a copartnership investment in a mine. That procedure would not at all effect a partition of the privilege.

Judicial jurisdiction to partition water rights has thus far been considered apart from the effect of the public navigation right and of the public right of control, through other governmental departments, of navigable streams to protect that use. Whether the public has other rights for other uses superior over private rights need not be here considered. The more valuable water powers, outside of mountain streams, arise on channels of navigable water because the power is greater and is near the larger centers of demand.

The public right to use, and right to control, through government, a navigable (boatable) fresh water though nontidal stream, applies to the whole natural channel so usable, and to every drop of the flow. People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461; Fulton Light, Heat, & P. Co. v. State, 200 N. Y. 400, 94 N. E. 199, 37 L.R.A.(N.S.) 307. At such a location any private right of use, resting either in original private ownership of land or in franchise, attaches only to the flow in excess of the volume required by the public. Congress has recently declared, under its superior power over navigable streams, that the Federal public required the whole flow of the Sault Ste. Marie, and the United States Supreme Court held that this step was within the right of Congress as against any conceivable private right of use. United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667. It would be idle, however, to pretend that no water is to ever waste at the Sault locks in summer or power waste there when frost stops Great Lake boating in winter. Any judicial partition then among several sharing in private use of streams not now used by the public may at any time prove a wasted effort in consequence of such governmental intervention as occurred at the Sault. It is on such streams, nevertheless, that such partitions have been decreed, for it is on those only that single powers of sufficient capacity to serve many users are found. The force of that decision is not at all confined to a case where the public seeks fuller enjoyment of the navigation right on interstate or boundary waters, which, under our system of governmental powers, is a matter of Federal concern. The case establishes that, as between citizen and government, whatever its form, to the extent of all public rights to use natural bodies of water for any purpose, the law will tolerate no infringement of it under pretense of private property rights. It is to be expected that all state courts will, in the fields of their concern, yield in due time to that doctrine of the court of highest respect.

This question of the power of the courts to partition may lose its importance to the lawyer as the present tendency toward consolidation of diversion rights grows. Very many water powers, each used by several independent small enterprises in the past, have already come under single corporate hands. Such a holder has no occasion to invoke any judicial jurisdiction over water-power uses. But these old partition decrees still stand as evidence, prima facie, of the judicial recognition of a jurisdiction to make them. That fact in turn is cited by private users of power as evidence to sustain the contention, boldly asserted to-day, that the right to divert our streams for private use is now well founded, at most sites where considerable power has been developed, in the private ownership of land and independently of legislative will; that such private right is vested in perpetuity and may be capitalized and mortgaged and, when the power is utilized as capital in the rendering of any public service, that the owner is entitled to demand from the public a profit computed on that capitalized value. In view of this, the matter becomes of new importance to the general public.



Price Maintenance

BY HARRY S. GLEICK

IN ORDER to discuss the problem of price maintenance, or price standardization, or uniform resale prices, as it is variously termed, it is well to define the meaning of the term. There is nothing vague about it; it is a technical term applicable to particular industrial transactions.

Price standardization, as its advocates prefer to call it, refers to the determination by the manufacturer of articles produced and sold by him, of the prices at which these articles shall be resold at retail to the consumer. Not all articles are included within the scope of the term, but only such as are sold under patents, trademarks, copyrights, or special brands, known generally as "identified goods."

Price standardization may be accomplished in any one or more of a number of different ways. First, by contract. The manufacturer X, sells patented automobiles to A, a dealer, A agreeing as part of the consideration that he will resell the machines to consumers only at the prices determined upon by X. Or, take the more usual case where X sells to B, a jobber, B agreeing to resell the automobiles only to those dealers who agree to maintain or who do maintain a certain resale price.

Secondly, by restriction upon the dealer by notice given or condition imposed by the manufacturer. X, the manufacturer, sells his trademarked shoes to a jobber, B, with a label attached to each pair of shoes stating that the retail price of these shoes is $6. B, the jobber, sells the shoes to A, the dealer, with the label attached. Should A be bound to sell the shoes for $6, and no less, the shoes being advertised everywhere by X as X's brand of $6 shoes, well worth the price? Or may he say, "These are my shoes; I will sell them for $4 if I choose to do so?"

A third situation is presented when there is no attempt made by the manufacturer to bind the jobber or dealer either by contract or even by notice of any kind, so as to constitute a legal obligation. The manufacturer of a special brand of flour may tell his dealers that the retail price of this flour is $2 per sack, that all dealers sell it at this price, and that he expects this dealer to do as the others. Nothing, however, is said in the contract as to the retail price. If the dealer does not keep faith with the manufacturer, ordinarily the latter simply refuses to sell to him any longer.

Another method is by the use of rebates, or other special advantages, given to the dealer who maintains prices. At the time that the sale is made there is no contract of any sort for the maintenance of a standard price; the dealer is not bound to sell at the manufacturer's price. There is simply an inducement offered to the dealer to make it worth while for him to abide by the manufacturer's wishes.

Price standardization may be secured by firms large enough to sell all of their products through agencies, the title being retained by the manufacturer. But this method of marketing goods requires such a large investment of capital that it is in general not a satisfactory method of obtaining uniform resale prices.

Maintenance of resale prices is also attempted by affixing to the article a notice that the manufacturer's name is not to be used in connection with the article if it is sold below a certain price. Thus X, a manufacturer of widely advertised watches, may place in the box with the watch that if it is sold at retail less than a price therein specified, X's name is not to be used in connection with the sale, and is to be erased from the face of the watch and the box in which it is sold.

Of these various methods, price standardization is most frequently attempted by the first two; *i. e.*, by means of contracts or by means of restrictions of the resale price by notice.

Who desires price standardization?

Large manufacturers of identified goods, especially those who advertise their products on a large scale; and small retailers, in general, favor uniform resale prices, believing that the manufacturer should be permitted to fix the price.[1] Their opponents consist chiefly of department stores, jobbing houses, mail-order houses, trading-stamp companies, chain stores, and some retailers.[2]

The purpose of the manufacturer of identified goods in desiring uniform resale prices is to prevent the reducing of prices upon goods which he has extensively advertised as being worth the standard price set upon them, and to prevent a price war upon his products, in which event many dealers would not care to handle them. The dealers' object is to protect themselves against price cutting, as the small dealer in particular believes that he is unable to hold his trade in identified goods if large stores cut prices, and that cut-throat competition will drive him out of business.

Is price maintenance economically sound? The objections are made that arrangements, whether by contract or by notice, under which the manufacturer sets the resale price, tend to keep up that price; that the price thus fixed by agreement is not subject to competition, and therefore it is an artificial price rather than a natural one. Contracts in general restraint of trade were illegal at common law, and are under statutes also, because they are undesirable from an economic standpoint. Such restraints, it is said, "have a tendency to promote monopolies and to discourage industry, enterprise, and just competition."[3] Arrangements which tended to promote monopolies, *i. e.*, to restrict individual freedom, or to keep up prices, were against public policy.[4]

On the other hand, it seems established that "it is a sufficient justification, and indeed the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time is in no way injurious to the public."[5] That is, where the restraint is a reasonable one, the very right to freedom from restrictions which the rule as to restraints sought to protect may be invoked to permit the vendor to protect himself. What is reasonable in any particular case is a question of law to be determined by the court.[6]

Price maintenance is a new problem in restraint of trade; practically all of the decisions are recent ones, most of them coming within the past ten years.

At the present time, manufacturers and dealers are asking, "What is the legal status of price maintenance? If uniform prices are provided for, by notice or by contract, will the arrangement fall within the common-law prohibition against restraints? And will we be liable to prosecution under the Sherman Anti-Trust Act,[7] which not only prohibits contracts and combinations in restraint of interstate trade, but also declares that all persons entering into such arrangements shall be deemed guilty of a misdemeanor?"

The question of legality arises in three general classes of cases: (1) Patent cases, either where the patentee is not the manufacturer, but licenses another to work the patent, or where the patentee also manufactures the articles himself, in either class the patentee attempting to control the price at which the patented article shall be sold at retail; (2) copyright cases, where the holder of a copy-

[1] The American Fair Trade League, of New York, is the name of an organization formed to aid in the establishment of price standardization.

[2] These interests have organized the National Trade Association, also of New York.

[3] J. M. Kerr, "Contracts in Restraint of Trade," 32 Am. L. Rev. 873.

[4] Pollock, Contr. 7th ed. pp. 354, 358; F. J. Goodnow, "Trade Combinations at Common Law," 12 Political Science Quarterly, p. 212.

[5] Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co. [1894] A. C. 535, 565, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Pollock, Contr. 7th ed. p. 353; Holland, Jurisprudence, 11th ed. p. 301; Amasa M. Eaton, "Contracts in Restraint of Trade, 4 Harvard L. Rev. 128, 136, and see infra, note 51.

[6] Pollock, Contr. 7th ed. p. 354.

[7] 26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, § 8820.

right attempts to determine at what price the book or other copyrighted article shall be marketed; and (3) arising over articles sold under a special brand, which may or may not be trademarked, and which in some cases may be manufactured by means of a secret process.

The legal questions come up for adjudication in two general groups of courts,—(1) the state courts, (2) the Federal courts. There is a lack of harmony between these two groups, and in each group there is difference of opinion.

In discussing the legal situation there is still another method of classifying the cases; *i. e.*, according to the nature of the restriction or limitation. When the manufacturer attempts to bind the jobber or dealer by contract, an entirely different legal situation exists from that where the restraint is undertaken by notice or condition independent of any contractual agreement.

This leads us to an examination of the legal situation as it exists to-day.

II.

There are, then, two classes of cases which should be carefully distinguished, the cases involving the validity of arrangements the purpose of which is to bind the middleman by contract to maintain a standard retail price upon identified goods, and the cases involving a limitation by notice or condition. Upon analysis of the contract cases, a line must be drawn between the case of a single contract, and the case where the manufacturer resorts to a "system" of contracts made with all dealers for the purpose of maintaining a price that will be everywhere uniform.

The simplest case is that involving a single transaction between a manufacturer and a dealer who sells directly to the consumer, the latter by contract agreeing to maintain the resale price set by the manufacturer.

In England, where the question has arisen, such contracts have been held valid and enforceable. Thus, in a case where the plaintiffs, manufacturers of proprietary medicines, sought an injunction to restrain the defendants from selling lower than the prices agreed upon, the defense being that the contracts were void as being in restraint of trade, the court remarked: "Why should not Messrs. Elliman be at liberty to fix the price in that way? Nobody has argued, and it could not possibly be argued, that they are not at liberty to fix the price on the first sale to Carrington & Son. Why should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? . . . To say that (the principle of restraint of trade) is to prevent Messrs. Elliman from exercising their own discretion seems to me to be applying a well-settled principle of law to facts to which it cannot have any possible application." [8]

The decisions in the state courts in this country involve contracts relating to special brands; the patent and copyright cases are Federal decisions, and there has also been Federal litigation over special brand articles sold under trademarks, such as proprietary medicines, not necessarily patented.

Of the state court decisions, a characteristic case was recently decided in Washington, which has been so widely quoted as to justify setting forth the facts at length. The complainant in his bill alleged that he was the manufacturer of a special brand of flour, "Fisher's Blend of Patent Flour;" that it was widely advertised and well known, and had through the quality of the flour and the efforts of complainant acquired a valuable reputation; that the complainant sold a large number of sacks of this flour to defendant, a dealer, with an agreement that the dealer would not sell below a certain fixed minimum price; that the defendant was selling below this price, in violation of the contract. The holding pointed out that there was no legal restriction of competition, as the field was open to all. "The fixing of the price was reasonably necessary to protect the appellant. . . . Fixing the price on all brands of high-grade flour is

[8] Elliman Sons & Co. v. Carrington & Son [1901] 2 Ch. 275, Accord: National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. [1908] 1 Ch. 335, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

a very different thing from fixing the price on one brand of high-grade flour. The one means destruction to all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has not interests to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and advertisement."[9]

The earliest case in the Federal courts affecting these problems seems to have arisen just after the passage of the Sherman Act, and dealt with a nonpatented commodity. An agreement to pay dealers a rebate to maintain the manufacturer's price was construed as not being in restraint of trade nor void under the act, being a reasonable protection of the vendor's business.[10] The court says by way of *dicta*: "But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it cannot be held to be a contract in restraint of trade. . . . The arrangement treated as a contract was founded upon a valid consideration, and only seemed to the vendors a reasonable protection in their business."[11]

As to patented articles, it was at first recognized by the Federal courts that they might be the subject of contracts by which their use and price in subsales might be controlled by the patentee, and that such contracts, if otherwise valid, were not within the terms of the Sherman Act nor the rules of the common law against monopolies and restraints of trade. There are two classes of cases, between which ordinarily no distinction has been made by the courts. The first involves the license by a patentee to others of the patent rights, the patentee himself not being the manufacturer, but usually receiving a royalty. In the other class the patentee is also the manufacturer, and the contracts are between him and middlemen. In both of these classes a contract restricting the resale uniformly has been held valid and enforceable, where there has been a simple contractual arrangement between the parties, in the absence of other circumstances tainting the transaction.[12]

The basis of these Federal decisions may be found, it is contended, in the purpose of the patent laws; the courts have not laid down a rule which would

[9] Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144, 51 L.R.A.(N.S.) 522 (1913). This opinion contains an excellent statement of the question by a court which recognized its economic aspects. Bobbs-Merrill Co. v. Straus, infra, note 41, p. 132, is distinguished on the ground that it was not a case of contract, but of mere notice; Dr. Miles Medical Co. v. Park & Sons Co. infra, note 27, p. 130, on the ground that the system of contracts in that case involved no purpose save to create and perpetuate a monopoly. In accord with principal case: Clark v. Frank, 17 Mo. App. 602 (1885); Grogan v. Chaffee, 156 Cal. 111, 105 Pac. 745, 27 L.R.A.(N.S.) 395 (1909); Com. v. Grinstead, 111 Ky. 203, 63 S. W. 427, 56 L.R.A. 709 (1901); Garst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900); Garst v. Charles, 187 Mass. 144, 72 N. E. 839 (1904); Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91 (1899). The early case of New York Ice Co. v. Parker, 21 How. Pr. 302 (1861) is sometimes cited as being in point, but it does not involve the resale of identified merchandise, and the legality of the contract was assumed without argument.

In New Jersey, price maintenance has been legalized by statute. See infra, note 34, p. 131.

[10] Re Greene, 52 Fed. 104 (1892). The transaction related to the sale of distilled alcohol, and the case is weakened by the fact that it does not appear whether or not it was identified. It probably was not. Though frequently cited by the courts on other points, the case has never been regarded as particularly applicable to contracts for price maintenance.

[11] 52 Fed. 118.

[12] The following cases recognize the validity of such contracts between the patentee and manufacturer: E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747 (1901); United States Consol. Seeded Raisin Co. v. Griffin & S. Co. 61 C. C. A. 334, 126 Fed. 364 (1903).

The following cases recognize the validity of such contracts between the patentee-manufacturer and middlemen: Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424 (1903); Wells & R. Co. v. Abraham, 146 Fed. 190 (1906); John D. Park & Sons Co. v. Hartman, 82 C. C. A. 158, 153 Fed. 24, 12 L.R.A.(N.S.) 135 (1907) semble; New Jersey Patent Co. v. Schaeffer, 159 Fed. 171 (1908); Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925 (1911); Lovell-McConnell Mfg. Co. v. International Automobile League, 120 C. C. A. 619, 202 Fed. 219 (1913); United States v. Keystone Watch Case Co. 218 Fed. 502, 514 (1915)—semble; American Grapho-

sustain articles sold merely under special brand. Thus, in one case the court declares, "The covenant for price restriction in the Bement case [13] and other cases referred to, although found in a license to manufacture and sell, was germane to the patentee's exclusive right of sale. It was assumed in all of these cases that such covenant was prima facie violative of public policy, but that it was met and overcome by the fact that the public, through the grant of the patent, had given the articles to be sold a status which enabled monopolistic bargaining; and that therefore the rules respecting ordinary sales could not apply." [14]

Yet the cases are not strictly limited to situations involving patents, but the courts have taken the same view where the litigation has arisen over copyrighted articles and articles manufactured under secret process.[15] But as to goods manufactured under secret process a more recent case vigorously contends that the rules applicable to the patent cases have no bearing.[16]

The United States Supreme Court has handed down several decisions in cases involving restrictions by notice merely, or of contract cases where there is a *system* of contracts, which have been in at least one instance erroneously applied to the case of single contracts. It was held that the patentee-manufacturer who sells automobiles made by it and delivers the same to dealers, passing the title upon the receipt of the contract price, must be held to have exercised his exclusive right to sell, so far as the particular commodity is concerned, and cannot legally fix the price at which the dealer shall resell.[17]

The complainant was proceeding upon the theory that the defendant, although not a contracting party, was wrongfully inducing dealers who were bound by contract to violate their covenants.[18] The court asks: "But is there any difference between an attempt to fix the price of future sales by notice, and an attempt to fix the price by contract? . . . It may be true that if the patentee had, by a sale of the article and the receipt of his price for it, passed the title to another, he cannot enlarge or extend that right by contract, or in any other way, for he has parted with what he had; and when he seeks to fix the price at which his vendee shall sell, he brings into operation other laws and policies which conflict with such attempt,—rules against restraints upon alienation; the common law against restraints of trade and monopolies, and the Sherman Anti-Trust Law. . . ." [19] But in another recent case the court fol-

phone Co. v. Boston Store, 225 Fed. 785 (1915).

To the effect that there is no difference in principle between these two classes of cases, American Graphophone Co. v. Boston Store, 225 Fed. 788. Contra: Ford Motor Co. v. Union Motor Sales Co. 225 Fed. 373 (1914); United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725, Ann. Cas. 1916A, 78 (1915).

[13] 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, see preceding footnote. To the same effect, John D. Park & Sons Co. v. Hartman, 82 C. C. A. 158, 153 Fed. p. 27-31, 12 L.R.A. (N.S.) 135.

[14] American Graphophone Co. v. Boston Store, 225 Fed. 785, 788.

[15] Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658 (1888)—proprietary medicine; Dr. Miles Medical Co. v. Platt, 142 Fed. 606 (1906)—proprietary medicine; Hartman v. John D. Park & Sons Co. 145 Fed. 358, 365 (1906)—proprietary medicine; Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838 (1906)—proprietary medicine; John D. Park & Sons Co. v. Hartman, 82 C. C. A. 185, 153 Fed. 24, 29, 12 L.R.A.(N.S.) 135 (1907)—copyright, semble. And see Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 426, 56 N. Y. Supp. 597 (1899)—copyright on book for which the holder of the copyright owned the plates.

[16] John D. Park & Sons Co. v. Hartman, 82 C. C. A. 158, 153 Fed. 24, 12 L.R.A.(N.S.) 135 (1907)—proprietary medicine. In this latter case, however, there was a "system" of contracts.

[17] Ford Motor Co. v. Union Motor Sales Co. 225 Fed. 373 (1914).

[18] Cf. Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706; Bowen v. Hall, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, 1 Eng. Rul. Cas. 717; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Walker v. Cronin, 107 Mass. 555; Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L.R.A. 722; Plant v. Woods, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L.R.A. 339.

[19] 225 Fed. 382, 383. The decision does not rest upon the ground that there was a "system" of contracts, but rather upon the consideration that in this particular instance there was an illegal restraint upon alienation.

lows the established rule, stating: "If the patentee may say to the world, 'I will confer upon anyone, by license, the right to manufacture and sell my patented article, provided he will observe a price fixed by me at which the article is sold to another,' he can say, 'I will manufacture the patented articles myself, and I will sell to no one except on condition that he will observe a resale price to be fixed by me.'" [20]

The latter of these two cases should be accepted as sounder law, and is not in conflict with any of the Supreme Court decisions; but the decision in the former case indicates the uncertainty of the law even as to simple contracts governing the resale of patented articles.

Where the manufacturer enters into contracts with all or practically all of the jobbers or dealers who purchase from him, some courts have termed this a "system" which, because of its monopolistic tendency, they will not recognize as valid, and will consider any particular contract as void.

Thus, in a Michigan case, where a medical preparation was made under a secret process and sold to dealers under a trademark, the retail price being fixed by a system of contracts between the manufacturer and all dealers buying from him, the court held that the contracts and the system operated as an unreasonable restraint upon competition.[21]

The leading case in support of the theory that the law abhors a *scheme* of such contracts is John D. Park & Sons Co. v. Hartman, where the article involved was "Peruna," a proprietary medicine.[22]

The court made the following comment upon Elliman & Sons v. Carrington [23] and Garst v. Harris: [24] "The most that can be made of the decisions is that, having regard to the subject-matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore not within the mischief of the rule against restraints." [25] The court conceded that contracts or restrictions by notice by patentees and holders of copyrights to secure uniform resale prices were not invalid, either according to the common law or by the Sherman Act, but takes the view that the rule does not extend to other articles. It was held that the defendant would not be restrained from inducing dealers who were under contract to violate their agreement, since the *system* of contracts was an unreasonable restraint upon competition, both at common law and by statute.[26] Since this case has been approved by the Supreme Court in a recent decision, the law in the Federal courts as to nonpatented and noncopyrighted articles is, that a *scheme* of contracts renders all of them invalid and illegal.[27]

The distinction drawn between the case of a single contract and the case of a system of contracts is an unfortunate one. The decision of the district court in Hartman v. John D. Park & Sons Co.[28] points out that each single contract between the manufacturer and the dealer being valid, the mere fact that there

[20] American Graphophone Co. v. Boston Store, 225 Fed. p. 788.

[21] W. H. Hill Co. v. Gray & Worcester, 163 Mich. 12, 127 N. W. 803, 30 L.R.A.(N.S.) 327 (1910). See also John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 96 Am. St. Rep. 578, 67 N. E. 136, 62 L.R.A. 632 (1903)—proprietary medicine—the doctrine of which case does not apply to ordinary articles sold under a special brand, according to an intimation in Straus v. American Publishers' Asso. 177 N. Y. 473, 477, 101 Am. St. Rep. 819, 69 N. E. 1107, 64 L.R.A. 701 (1904). And in the Park Case, the court evidently based its decision upon the fact that the patent laws permitted such a scheme; John D. Park & Sons Co. v. Hartman, 82 C. C. A. 158, 153 Fed. 24 at pp. 35–37, 12 L.R.A.(N.S.) 135. While the articles were "patent" medicines, it is very doubtful if they were actually patented.

[22] 82 C. C. A. 158, 153 Fed. 24, 12 L.R.A. (N.S.) 135 (1907), decision by Justice Lurton. The case reversed Hartman v. John D. Park & Sons Co. 145 Fed. 358 (1906).

[23] Supra, note 8, p. 127.

[24] Supra, note 9, p. 128.

[25] 153 Fed. 37.

[26] Earlier cases contra: Wells & R. Co. v. Abraham, 146 Fed. 190 (1906); Hartman v. John D. Park & Sons Co. 145 Fed. 358 (1906) —reversed by principal case: Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838 (1906).

[27] Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376 (1911). Accord: United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725, Ann. Cas. 1916A, 78 (1914).

[28] 145 Fed. 358.

were a large number of such contracts is hardly sufficient in itself to bring the situation within the scope of the Sherman Act. "There is no combination between persons engaged in the same kind of business to regulate their respective businesses for their mutual benefit to the harm of strangers or the public at large." [29] Justice Holmes, in his dissenting opinion in Dr. Miles Medical Co. v. John D. Park & Sons Co., points out the distinction which the majority of the court seem to overlook: "I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the idea of fixing a general market price. This reason seems to me to be inadequate in the case before the court. . . . The analogy relied upon to establish (the evil effect of the contract) is that of combinations in restraint of trade. I believe that we have some superstitions on that head. . . . Those combinations are entered into with intent to exclude others from a business naturally open to them, and we have unhappily become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case." [30]

If it is reasonably necessary for the protection of the manufacturer-vendor in the case of a single contract that an agreement be reached with respect to the price at which the dealer-vendee shall resell, at least the same considerations would appear to be present when the agreement is made with all dealers.

Summarizing, as to contractual arrangements, the law at present is that in England, whether the identified goods in question are patented or not, the courts regard the agreements as valid, and this rule is followed in our state courts. In the Federal courts, a distinction exists in a situation where there is a system of contracts. Where there is such a scheme the agreements are all invalid and illegal; where there is not, the patent contracts are held valid under the patent laws. The copyright and secret-process cases have been sustained for the same reasons that underlie the patent cases. But there is now considerable doubt even as to patented articles what rule the Supreme Court will adopt.

Practically all courts have recognized that a different situation exists when the attempt is made by the manufacturer to bind the dealers by mere notices or conditions attached to the goods, even when the result reached is the same.[31]

The law in England is well settled. Under the English patent laws it is possible for the patentee to make a sale of the patented article subject to conditions and restrictions by notice as to its resale, including the fixing of resale prices.[32] But in the case of articles not protected by patent an opposite conclusion was reached, the courts holding that there must be direct contractual relationship between the parties.[33]

In this country in the state courts the few decisions that there are seem to favor the English view, that attempted restrictions of nonpatented articles are between the parties.[33]

[29] 145 Fed. 380.

[30] 220 U. S. 373, 409, 411, 413.

[31] Notice is used to include any restriction brought to the knowledge of the purchasing dealer.

[32] National Phonograph Co. v. Menck [1911] A. C. 336, 104 L. T. N. S. 5, 80 L. J. P. C. N. S. 105, 27 Times L. R. 239, 28 Rep. Pat. Cas. 229, 48 Scot. L. R. 733. Cf. Incandescent Gaslight Co. v. Cantelo, 12 Pat. Cas. 262 (1895).

[33] Taddy & Co. v. Sterious & Co. [1904] 1 Ch. 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102; McGruther v. Pitcher [1904] 2 Ch. 306, 3 B. R. C. 292, 72 L. J. Ch. N. S. 653, 20 Times L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678; Dunlop Pneumatic Tyre Co. v. Selfridge & Co. 110 L. T. N. S. 679, [1915] W. N. 59, 83 L. J. K. B. N. S. 923, 30 Times L. R. 250 (1914). These cases hold that an attempt to make the acceptance of the article a contract with the manufacturer is of no avail.

[34] Garst v. Hall & L. Co. 179 Mass. 588, 61 N. E. 219, 55 L.R.A. 631 (1901); W. H. Hill Co. v. Gray Worcester, 163 Mich. 12, 127 N. W. 803, 30 L.R.A.(N.S.) 327 (1910); Straus v. American Publishers' Asso. 177 N. Y. 473, 10 Am. St. Rep. 819, 69 N. E. 1107, 64 L.R.A. 701 (1904)—noncopyrighted books. Contra: D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Straus v. American Publishers' Asso. supra,—copyrighted books.

The California case was decided under a statute providing that "a contract made expressly for the benefit of a third person may

Upon the principle subsequently laid down by the Supreme Court in Henry v. A. B. Dick Co., the "Mimeograph" case,[35] the lower Federal courts in patent cases, until recently, sustained the validity of restrictions by notice, holding that a dealer who violated the restriction was an infringer of the patent.[36]

The decision in Henry v. A. B. Dick Co.[37] was handed down in 1912. In this case a mimeograph machine was sold under a "license restriction" that it should be used only with a certain kind of ink. A dealer in another kind of ink, knowing of this restriction, sold a purchaser of the machine his ink to be used in violation of the restriction. He was held, by a divided court, liable for an infringement, as abetting an infringing use. The theory of the majority was that the sale of the patented article was not unconditional; the right purchased was limited by the restriction. The general impression was that the doctrine of the case was broad enough to permit the patentee to place such restrictions and conditions upon patented goods as he chose.

But Bauer v. O'Donnell,[38] decided the following year, drew a distinction not previously recognized.[39] The court pointed out that the restriction in the Dick Case was in respect to the use of the article, while in the situation before the court the limitation was not as to the use at all, but as to the price of subsequent sales; that the maintenance of prices by such a restriction was against public policy; and that there was nothing in the patent laws to take the case out of the rule laid down in Dr. Miles Medical Co. v. John D. Park & Sons Co.[40]

As to nonpatented articles, the law in Federal jurisdictions seems to be settled that the manufacturer cannot, by notice or condition, bind a dealer not a party to an agreement with him.[41]

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be enforced by him at any time before the parties thereto rescind it," and the jobber reselling did make the dealer. In connection with the New York case, see Straus v. American Publishers' Asso. 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369, L.R.A.1915A, 1099, holding that the status of a combination otherwise in restraint of trade, illegal under the Sherman Act, is not changed because its object was to maintain the resale price of copyrighted books.

In New Jersey a statute has been passed making the price cutting of trademarked or branded articles unlawful whenever the articles carry a notice prohibiting such practice, except in case of a receiver's sale, or a sale by a concern going out of business: N. J. Sess. Laws, 1913, chap. 210.

[35] See infra, note 37.

[36] Edison Phonograph Co. v. Kaufman, 105 Fed. 960 (1901); Edison Phonograph Co. v. Pike, 116 Fed. 863 (1902); Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424 (1903); National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733 (1904); Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 358 (1907); Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365 (1907)—semble; The Fair v. Dover Mfg. Co. 92 C. C. A. 43, 166 Fed. 117 (1908); Edison v. Ira M. Smith Mercantile Co. 188 Fed. 925 (1911); Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 Fed. 205 (1911); Waltham Watch Co. v. Keene, 191 Fed. 855 (1911); Winchester Repeating Arms Co. v. Buenger, 199 Fed. 786 (1912)—system of restrictions.

[37] 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. Rep. 364, Ann. Cas. 1913D, 880.

[38] The "Sanatogen" Case, 229 U. S. 1, 57 L. ed. 1041, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, 50 L.R.A.(N.S.) 1185. The majority in the Dick Case consisted of Justices Lurton, McKenna, Holmes, and Van Devanter; Chief Justice White, Justices Hughes, and Lamar dissenting. In Bauer v. O'Donnell the decision was rendered by Justice Day, Chief Justice White, Justices Hughes, Lamar, and Pitney concurring; Justices Lurton, McKenna, Holmes, and Van Devanter dissenting.

[39] That is, as a general rule. But the distinction made by the Supreme Court was anticipated by several months in Waltham Watch Co. v. Keene, 202 Fed. 225. The decision reflects the result of Bobbs-Merrill Co. v. Straus, infra, note 41, and Dr. Miles Medical Co. v. John D. Park & Sons Co. supra.

[40] Supra, note 27, p. 130. The following Federal cases are in accord: Kellogg Toasted Corn Flake Co. v. Buck, 208 Fed. 383 (1913); Ford Motor Co. v. International Automobile League, 209 Fed. 235 (1913); United States v. Keystone Watch Case Co. 218 Fed. 502, 514 (1915); United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725, Ann. Cas. 1916A, 78 (1915); Ford Motor Co. v. Union Motor Sales Co. 225 Fed. 373 (1914); American Graphophone Co. v. Boston Store, 225 Fed. 785 (1915).

[41] Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722 (1907)—copyright; John D. Park & Sons Co. v. Hartman, 82 C. C. A. 158, 153 Fed. 24, 28, 12 L.R.A.(N.S.) 135 (1907)—copyright, and special brand, semble; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376 (1910)—proprietary medicines. Contra: Authors & N. Asso. v. O'Gorman Co. 147 Fed. 616 (1906)—copyright.

Summarizing the cases as to the maintenance of uniform resale prices by notice or condition, it may be said that it is possible, under the laws, for the manufacture of a patented article to make a valid limitation as to the resale price, but this rule does not extend to nonpatented articles. In the absence of statute in this country as a general rule such a restriction upon nonpatented articles, whether copyright or special brand, is likewise void. The earlier Federal court decisions to the effect that such restrictions upon patented articles were valid have been overruled, and now price maintenance is no longer upheld.

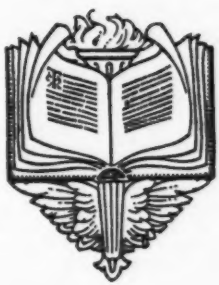
The giving of rebates or other inducements, in the absence of other objectionable features, has been upheld,[42] although it is not so certain that this view would be accepted generally at the present time. Then, of course, it is possible, legally, for a manufacturer to sell all his wares through agents. And a manufacturer may refuse to sell to a dealer who cuts prices, or to a jobber who sells to price-cutting dealers.[43] For practical reasons, however, most manufacturers find these methods of standardizing prices unpracticable, or less satisfactory than by a binding restriction by contract or notice.

The trouble with the present situation, then, as those in favor of price standardization see it, is, that under the existing interpretation of the phrase "restraint of trade" it is probably illegal to seek to maintain the prices of identified goods of any sort by notice or condition. It is also now very doubtful whether even contracts will be upheld, especially in the Federal courts. It is clear that systems of contracts will be held illegal. Of course, one must bear in mind that, notwithstanding the interpretation placed upon these arrangements by the courts, a vast amount of business transactions are nevertheless carried on just as if they were not frowned upon by the courts. It is only the exceptional case that comes up for adjudication. But, on the other hand, the number of cases in the courts involving attempts to standardize the prices of identified goods has increased greatly during the past few years. As by far the most important part of the transactions in identified goods consists of "commerce among the several states," the demands for Federal legislation by the opponents of price cutting have become increasingly stronger.

[To be continued.]

[42] Clark v. Frank, 17 Mo. App. 602; Re Greene, 52 Fed. 104; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91. Cf. Weiboldt v. Standard Fashion Co. 80 Ill. App. 67—guaranty of certain district.

[43] Com. v. Grinstead, 111 Ky. 203, 63 S. W. 427, 56 L.R.A. 709; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637, 645; Union P. Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737, 739; Wells & R. Co. v. Abraham, 146 Fed. 191, 193—semble; Great Atlantic & P. Tea Co. v. Cream of Wheat Co. 224 Fed. 566 (Dist. Ct.), 141 C. C. A. 594, 227 Fed. 46 (C. C. A.). Cf. Straus v. American Publishers' Asso. 177 N. Y. 473, 101 Am. St. Rep. 819, 69 N. E. 1107, 64 L.R.A. 701, Id. 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369, L.R.A.1915A, 1099. Also an article by Rome G. Brown (of counsel in "Cream of Wheat" Case, supra), "The Right to Refuse to Sell," 25 Yale Law Jour. 194.



Promises to One of Performance to Another

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THIS title is taken from a note in Ames's Cases on Trust. It is selected because it avoids an ambiguity in the terms usually used. In the use of the words "for the benefit of another" or "intended for the benefit of another," the courts refer not to the motive of the promisee, but to the fact that performance is to be rendered to the third person. When the grantor requires the assumption of a lien, or when a surety demands security to him for the payment of the debt, the motive of each is to protect himself. He protects himself by providing for payment to the creditor. His motive is irrelevant.[1]

Two conflicting principles have been at work in the common law since the invention of the action of assumpsit. Liability in assumpsit rests on a detriment suffered by the plaintiff; liability in debt, on a benefit received by the defendant, for which he ought to pay as agreed. The essentials in debt are a *quid pro quo* received and a duty to pay. The money is due to him to whom it is to be paid.

The assumpsit principle prevailed in England. The debt principle survived in America. Early American cases, decided under the influence of the assumpsit principle, have delayed the natural development of the American rule. An attempt to conform the rule to those decisions is the sole cause of "the confusion worse confounded in the decisions" to which the rule is said to have led.[2] The remedy is to be found by following the rule to its logical conclusions.

The salient points of the rule in its natural development are these: The promise creates a direct and primary obligation to the third person. The promisee cannot release, nor can he rescind.[3] He cannot sue at law until he has rendered the performance to the third person, or until the third person has rejected the benefit of the promise.[4] In a "creditor" case, the promisee may sue for exoneration, to compel payment to the creditor. In a "sole beneficiary" case, the promisee may sue for specific performance to the beneficiary. At law, he could recover nominal damages only.[5] In a court which can give equitable relief in any suit, the right of the promisee to nominal damages should not be recognized. He should seek equitable relief and force performance to the third person. This is what he bargained for and all to which he has any right.[6]

Germ of American Rule—In Debt.

Where money was received to be delivered to a third person or to his use, it was countermandable, and the old rule was that the third person could not have action of debt, but account only; but when the money was received "to be paid" to the third person, "which is intended in satisfaction of a debt, there it is not countermandable, and he who is to receive it as a debt may upon this receipt have an action of debt or account." The receipt of the money created a debt to the third person, though "there never was any contract betwixt the plaintiff

[1] Bishop, Contr. 1219; Jordan v. Kavanaugh, 63 Iowa, 157, 18 N. W. 851; R. Connor Co. v. Ætna Indemnity Co. 136 Wis. 13, 115 N. W. 811; National Surety Co. v. Foster Lumber Co. 42 Ind. App. 671, 85 N. E. 489; Emmitt v. Brophy, 42 Ohio St. 82.

[2] Harriman, Contr. 217.

[3] Fanning v. Murphy, 126 Wis. 538, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435, 4 L.R.A.(N.S.) 666; Ashley, Contr. 245; Hill v. Hoeldtke, 104 Tex. 602, 142 S. W. 871, 40 L.R.A.(N.S.) 672; 3 Pom. Eq. Jur. 1206, p. 2409, note, pp. 2405, 1207, and note 3.

[4] Gunst v. Pelham, 74 Tex. 586, 12 S. W. 233; 3 Pom. Eq. Jur. 1207, p. 2414 and note 2.

[5] Langdell, Eq. Jur. 17.

[6] Throop, Verbal Agreements, 390.

and the defendant, nor any delivery of money by the plaintiff to the defendant." [7]

"To be paid" imports a debt to the one to whom the money is to be paid. It may be said that the words refer to a prior debt to the third person. Such a debt would have prevented a countermand. If the words refer to a prior debt then, also, the contract created a debt from the receiver to the third person. The receiver assumed the prior debt. He made it his own debt, and became a debtor to the third person.

The receipt of money to be delivered to a third person, or to his use, created a defeasible obligation to him. The money could be countermanded.[8] If, on demand made before a countermand, the receiver did not account to the third person, the defeasible obligation ripened into a debt to him.

When land is devised to A, "he paying," or "on condition that he pay" to B, B acquires a right against A which "is enforced at common law by an action of debt or indebitatus assumpsit, although B was a stranger to the transaction." [9]

Though the third person cannot sue on a specialty, it may create an obligation to him. He may sue in indebitatus assumpsit, using the sealed instrument as evidence of his right to recover.[10]

In Detinue.

"A bailment of goods by A to B to deliver to C, or for the use of C, gave C the right to maintain detinue against B.[11] If there was a prior debt to the third person, the bailment was not countermandable.[12] If there was no debt precedent, the bailment was countermandable, and if the bailor sued first, he recovered the property. The obligation to the third person was defeasible until he sued. It then became absolute. Detinue was, at this time, an action *ex contractu*.[13]

The third person could sue in detinue, not because he was the owner, but because the bailment created an obligation to him. He did not become the owner until he sued. The bailor was the owner. If he sued first, he recovered the property to his own use, "for by the delivery to the defendant, J. S. has no property in it, and therefore plaintiff may countermand it, and yet by this delivery to defendant, J. S. may have account, if it be not countermanded." [14]

"One for whose benefit a bailment was made could have detinue, although he was not the owner of the property bailed. Thus, on bailment of a charter by A to B, to deliver to C, who was not the owner of the land, C recovers by priority of bailment." [15]

In Account.

For money given by A to B to be delivered to C, or to his use, C could have account. "A also could sue B, and A or C would recover according to which sued first." [16] The money was not C's money. It was A's money, "for by the delivery C has no property in it." The receiver assumed a defeasible obligation to C, which became absolute when he demanded an accounting.

"There never was any necessity of privity in the old action of account, and when debt and indebitatus assumpsit became concurrent remedies, the requisites for account should be regarded as sufficient, and privity should not be brought in." [17]

The rule that money received to be delivered to another was not countermandable after demand by the third person suggests that a check ceases to be revocable when presented for payment, and that the promise of the bank to the depositor to pay his checks then becomes a

[7] Harris v. de Bervoir, Cro. Jac. 687, 79 Eng. Reprint, 596; Ames, Cases on Trusts, 4.
[8] Langdell, Eq. Jur. 81, note 4.
[9] Ames, Cases on Trusts, 3, note 2; Williston's Wald's Pollock, Contr. 252.
[10] Clark v. Walker, 9 Houst. (Del.) 287, 32 Atl. 246.
[11] Ames, Cases on Trust, 52, note 1.
[12] Lyte v. Peny, 1 Dyer, 49a, 73 Eng. Reprint, 108; Atkin v. Barwick, 1 Strange, 165, 93 Eng. Reprint, 450, s. c. 10 Mod. 431, 88 Eng. Reprint, 795; Harris v. de Bervoir, Cro. Jac. 687, 79 Eng. Reprint, 596; Ames, Cases on Trusts, 4.
[13] Ames, Lectures Legal History, 71 to 75; Ames, History of Trover, Essays Ang. Am. Law, 432.
[14] Langdell, Eq. Jur. 81, note 4, quoting Bro. Abr. Replication, pl. 65.
[15] Ames, Lectures Legal History, 72.
[16] Ames, Lectures Legal History, 119.
[17] Ames, Lectures Legal History, 119.

promise of performance to the holder. Those courts may be right which hold that when the check is presented for payment, the holder acquires a right against the bank.

It may be well to note here how far, under the influence of the assumpsit principle, the English courts have departed from the principle applied in debt, detinue, and account. The receiver of money to be paid to another is not liable to him until the receiver has admitted to the third person that he holds the money on these terms.[18]

It is said that the old law treated the right of the creditor in debt as a property right. This may be putting the cart before the horse. The old law treated the right of the creditor as it treated the right of the owner to property adversely held, but the right of the true owner was a chose in action, a right to the performance of an obligation imposed on the adverse holder.[19] The adverse holder had title indefeasible except in a suit by the true owner.[20] As to all others, he was the owner. He was under an obligation to "render" the property. The right of the true owner was a right to the performance of this obligation. The writ of debt, the writ of detinue, the writ of account, and the writ of right, each commanded the defendant to render to the plaintiff, because in each case the defendant was under an obligation to render.

The liability in detinue was absolute, though the chattel was lost or destroyed without fault of the defendant.[21] The defendant owed the chattel just as the debtor owed the money. The right of the third person in account can hardly be explained as based on a property right. Account was based on an obligation to account.[22] "Account disaffirms property in the plaintiff."[23] Were these difficulties removed, the explanation would be of little value. If an agreement can vest a property right in a third person, it can create an obligation to him. The objections seem to be purely metaphysical. Contracts do create obligations to third persons. If this does not accord with some definition of "obligation," the definition should be revised. "The contractual duty exists, and unless we suffer ourselves to become entangled in a verbal quibble, we must admit that the duty is one owing to the third person."[24]

"The beneficiary recovered in account because the judicial instinct recognized that he ought to recover, and the courts held that he had a substantive right. This common-law right was an expression of a public sense of justice, and a firmer foundation for a positive rule of law need not be sought."[25]

In the Law Merchant.

A promise to accept or to pay, given by the drawee to the drawer of a bill of exchange, inured to the benefit of the holder and was a virtual acceptance, though the promise was not known to the holder when he took the bill.[26] The law merchant was older than assumpsit. It knew nothing of a consideration moving from the plaintiff. Lord Mansfield held that the promise to accept was good without a consideration. "In commercial cases, amongst merchants, the want of consideration is not an objection."[27] "It is the settled doctrine of the English courts that a promise to accept an existing bill is an acceptance, although the bill is not taken on the credit of the promise." (8 C. J. 308.)

As to a promise to accept a bill yet to be drawn, the English courts made a distinction. The promise cannot be an acceptance when it is made. There is no bill to accept. Not being assignable at law, the promise cannot pass to the holder so that he can sue in his own

[18] 7 Laws of England (Halsbury) 344, pl. 712; Dicey, Parties, 93.
[19] Ames, Lectures Legal History, 192; 3 Holdsworth, History English Law, 81, 267.
[20] Ames, Lectures Legal History, 173, 177, 180, 189, 193; Pollock & W. Possession, 90.
[21] Holmes, Common Law, 167, 175–180.
[22] Langdell, Eq. Jur. 74.
[23] Ames, Lectures Legal History, 116.
[24] Street, Foundations of Legal Liability, 156, 158, 160.
[25] Henning, Beneficiary in Assumpsit, 3 Essays, Ang.-Am. L. Hist. 367.
[26] Powell v. Monnier, Atk. 611, 26 Eng. Reprint, 384; Wynne v. Raikes, 5 East, 513, 102 Eng. Reprint, 1167; Jones v. Council Bluffs Branch of State Bank, 34 Ill. 313, 85 Am. Dec. 306.
[27] Pillans v. Van Mierop, 3 Burr. 1663, 97 Eng. Reprint, 1035.

name as on an accepted bill.[28] If the holder sues on the promise, he must sue as the assignee of the promisee and in his name.

The American courts refused to follow Johnson v. Collings. If the promisor is indebted to the drawer, or if the promisee gives any other consideration, the promise inures to the benefit of the holder, because it is a promise of performance to him. The promise becomes an acceptance when the bill is drawn. If the promisee gives no consideration, the so-called promise is an offer, which becomes a promise to anyone who, on the faith thereof, gives value for the bill. (8 C. J. 309.) The promise inures to the benefit of any holder who presents the bill for acceptance, because it is a promise of performance to him.

In Assumpsit.

In an early English case, decided in 1651, a father gave goods to his son in consideration that the son should pay £20 to Starkey, the plaintiff. Judgment was given for the plaintiff. Chief Justice Roll said: "There is a plain contract because the goods were given for the benefit of the plaintiff, though the contract is not between him and the defendant, and he may well have an action on the case, for here is a promise in law made to the plaintiff, though there be no contract in fact, and there be debt here."[29] The words, "and there be debt here," indicate that the chief justice was aware that he was applying in assumpsit a principle derived from the older action of debt. The same reference to debt is found in the words of C. J. Scroggs in Dutton v. Poole, 1 Vent. 332, 86 Eng. Reprint, 215; "and it is a kind of debt to the child to be provided for."

In Equity.

When a contract is made with A to give a thing to B, equity will "annex to such a contract an obligation directly to B, and hence the latter can obtain in equity, without difficulty, the benefit intended to be secured to him by the contract."[30]

Trusts for third persons are common. The right of the *cestui que trust* rests on a personal obligation of the trustee to him.[31] This obligation is created by contract. "I think it impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created. For my own part, I think that we ought to confess that we cannot define either agreement or contract without including the great majority of trusts."[32] The right of the *cestui que trust* "is in truth a contractual right, a right created by a promise."[33]

Subrogation of the Creditor to Securities Held by the Surety.

If the principal gives to the surety "a mortgage or bond to indemnify him," the creditor "shall have the benefit of it to recover his debt."[34] "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor."[35] The creditor's right to securities given to the surety is here made an argument in favor of the surety's right to subrogation.

If the security held by the surety is for payment to the creditor, he has the beneficial interest. The surety is a trustee for him, not because a trust was intended, but because the surety did intend to exact a security for payment to the creditor. The motive of the surety was to protect himself, but he provided for his own protection by exacting a security for payment to the creditor.

The creditor's right to subrogation does not depend on the security being a lien on the property of the principal, though that fact may be an additional

[28] Johnson v. Collings, 1 East, 98, 102 Eng. Reprint, 40.

[29] Starkey v. Mill, Style, 296, 82 Eng. Reprint, 723; Ashley, Contr. 239; 30 Cyc. 60.

[30] Langdell, Eq. Jur. 17.

[31] Maitland, Eq. 115, 116, 119, 121, 29, 31, 18, 19, 23, 54; Langdell, Eq. Jur. 5, 254; Ames, Lectures Legal History, 76, 108, 233, 255.

[32] Maitland, Eq. 54.

[33] Maitland, Eq. 54; Williston's Wald's Pollock, Contr. (209) 230.

[34] Maure v. Harrison, 1 Eq. Cas. Abr. 93, 21 Eng. Reprint, 904.

[35] Wright v. Morley, 11 Ves. Jr. 21, 32 Eng. Reprint, 992, 8 Revised Rep. 69.

reason for subrogation. If the lien on the property of a third person is for payment to the creditor, it inures to his benefit.[36] His right to subrogation extends to a bond to the surety, conditioned for payment to the creditor.[37]

The right of the creditor is direct, and does not depend on his rights as a creditor of the surety. The right exists though the surety's promise is void under the Statute of Frauds.[38] The right continues, though his claim against the surety has been barred by the Statute of Limitations, discharged in bankruptcy, or released "by some act of the creditor such as an extension of time or a release of the principal." (32 Cyc. 146.) The surety cannot release.[39]

Indemnity against Liability.

A security for indemnity against liability is satisfied by payment to the creditor. If he is not paid, the security is forfeited. It seems to be the better opinion that a security for indemnity against liability is, in legal effect, a security for payment to the creditor.[40] The creditor's right is direct, and the surety cannot release

Indemnity against Loss.

If the security is for indemnity against loss, the creditor's right is derivative, and rests on his rights as a creditor of the surety. A solvent surety may release. The right to indemnity is an asset. The creditor is the only one who can treat it as an asset. The sole right of the surety is to have the debt paid. An insolvent surety cannot give away his right to indemnity, nor can he release for a consideration. He cannot increase his insolvent estate at the expense of the creditor. The right of the surety is to have the debt paid. Can the creditor reach the right to indemnity against loss before payment by the surety?

If the security is a lien on the property of the principal, there is no difficulty. In a suit for exoneration, the surety can have the property applied in payment of the debt to the creditor. The creditor is subrogated to this right.[41]

Though the security is not a lien on property of the principal, it is an asset of the insolvent surety. He may use it as an asset. He may borrow money to pay the debt, using the right to indemnity as collateral. He may assign the right to the creditor in payment of the debt. He ought to do this. By refusing to do it, he waives a right which he could use for the payment of the debt. Equity forces him to do it by subrogating the creditor to the security. The use of the indemnity as an asset must not depend on the whim of an insolvent.

Any provision in the contract of indemnity to prevent this subrogation should be treated as a devise to defraud creditors. The surety burdens his estate in exchange for the indemnity. The creditor may rightly demand that the indemnity be used as an asset to pay him, and other creditors may demand that it be so used for the relief of the insolvent estate. A right which is an asset while the owner is solvent cannot cease to be an asset when he becomes insolvent. No one can use his property to pay for an indemnity of that kind, nor can he pledge his credit in exchange for such an indemnity.

The Assumpsit Principle.

Assumpsit was an action of tort for a detriment suffered by the plaintiff on the faith of a promise which had not been performed, and was not enforceable at law. The detriment suffered by the plaintiff was the gist of the action. If the detriment was suffered by one and the promise made to another, the promisee could not sue.[42] Suit by such a promisee is as much a violation of the assumpsit principle as is a suit by a third person, to whom performance is to be rendered. The consideration must move from the

[36] Magoffin v. Boyle Nat. Bank, 24 Ky. L. Rep. 585, 69 S. W. 702.

[37] Brown & H. Co. v. Ligon, 92 Fed. 851; Johnson v. Martin, 83 Wash. 364, 145 Pac. 429, L.R.A.1916C, 1057.

[38] Jack v. Morrison, 48 Pa. 113; Kerr v. Hough, 22 Ky. L. Rep. 1693, 61 S. W. 262.

[39] Webster v. Mitchell, 22 Fed. 869; McRady v. Thomas, 16 Lea, 173; Note to Johnson v. Martin, L.R.A.1916C, 1070, 1072, 1079.

[40] Swift v. Kortrecht, 50 C. C. A. 433, 112 Fed. 709; Johnson v. Martin, 83 Wash. 364, 145 Pac. 429, L.R.A.1916C, 1057; Note to Johnson v. Martin, L.R.A.1916C, 1075.

[41] Hauser v. King, 76 Va. 731; Note in L.R.A.1916C, 1077.

[42] Langdell, Contr. 63; Dicey, Parties, 81, 82.

plaintiff to-day, because only he who had incurred a detriment on the faith of the defendant's promise could maintain the action on the case for deceit in the time of Henry VII.[43]

When the third person first sued in assumpsit, account had become obsolete, debt on simple contract had been displaced by assumpsit, and detinue by trover. Indebitatus assumpsit on promises implied in fact or in law had not been developed.[44] Special assumpsit was the only action open to the third person. The earlier decisions were in his favor.[45] The cases in debt, detinue, and account were, however, soon forgotten. The English law of contract was developed in special assumpsit. The common law had a law of debt, a law of account, a law of covenant, and a law of assumpsit. A general law of contract was a late development.[46] To the English lawyer, the law of assumpsit became the law of contract. The assumpsit principle was enshrined in the form of declaration. It was never forgotten that assumpsit was based "on an undertaking the making of which had exposed the plaintiff to a charge." [47]

At law the assumpsit principle prevailed in England in 1861.[48] The debt principle survived in equity to a later date. In 1890, the creditor's right to securities held by the surety was denied.[49] In 1899, it was held that a purchaser who has assumed a mortgage is not liable to the mortgagee.[50] "Were it not for strained decisions in the law of trusts, the English courts would be obliged to make more unfortunate decisions than they do."[51]

The assumpsit rule is not a rule of construction. It is well to note this because an obsolescent rule may linger for a time as an arbitrary rule of construction. "The parties to a contract cannot confer on a third person the right of maintaining or defending a suit in respect to it in his own name." [52] The last words quoted seem to imply that, even in the English courts, the third person might sue in the name of the promisee, treating the exaction of a promise of performance to him as an assignment.

Debt Principle Survives in America.

In America, debt on simple contract, detinue, and account were in use. We had no wager of law. Account was an important action in states which had no court of equity. The use of the old abridgments kept alive the law of the old cases. Hence, the survival of the debt principle in America. Indebitatus assumpsit was extended in America beyond the limits fixed by the English cases. This gave assumpsit to the third person. "The law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."[53]

A contract is "for the benefit of the third person," when performance is to be rendered to him. If performance is to be to the promisee, and the benefit to the third person is incidental, the case is not within the rule. The distinction rests on the nature of the promise, not on the motive of the promisee.[54] A surety's motive may be to protect himself, but he may provide for his own protection by taking a security for payment to the creditor. The security inures to the benefit of the creditor.

The American courts sustain actions

[43] Ames, History of Assumpsit, 3 Essays, Ang.-Am. L. Hist. 276; Hare, Contr. 134; 3 Holdsworth, History English Law, 345, 346.

[44] Ames, Lectures Legal History, 155.

[45] Starkey v. Mill, Style, 296, 82 Eng. Reprint, 723; Rookwood's Case, Cro. Eliz. pt. 1, p. 164, 78 Eng. Reprint, 421; Throop, Verbal Agreements, § 386, note; 30 Cyc. 60; 1 Cranch, 429, 430, note, 2 L. ed. 164.

[46] Jenks, Dig. Eng. Civ. L. Preface to bk. 2, pt. 1.

[47] 3 Holdsworth, History English Law, 344.

[48] Williston's Wald's Pollock, Contr. 233.

[49] 37 Cyc. 437, note 82.

[50] 30 Cyc. 64, note 96.

[51] Williston's Wald's Pollock, Contr. 244.

[52] Jenks, Dig. Eng. Civ. L. 104, pl. 231; Williston's Wald's Pollock, Contr. (211), 232; 7 Laws of England (Halsbury) 342; Hare, Contr. 146; Langdell, Contr. § 63, p. 80.

[53] Brewer v. Dyer, 7 Cush. 340; 30 Cyc. 60, 61, note 78.

[54] Bishop, Contr. § 1219. Compare the following cases with the Water Company Cases cited in Williston's Wald's Pollock, Contr. 254: Pond v. New Rochelle Water Co. 183 N. Y. 330, 76 N. E. 211, 5 Ann. Cas. 504, 1 L.R.A. (N.S.) 958; Robbins v. Bangor R. & Electric Co. 100 Me. 496, 62 Atl. 136, 1 L.R.A.(N.S.) 963; Jenkins v. Chesapeake & O. R. Co. 61

of tort by third persons for breach of duty to them assumed by contract.[55] The only question is: Does the contract impose a duty to third persons? The English courts seem to hold that a contract cannot impose such a duty.[56]

The New York courts tried to restrict the rule by requiring "an intent to secure some benefit to the third person," and "some obligation or duty owing" from the promisee to the third person.[57] The second requirement is inconsistent with the "sole beneficiary" cases, and the first with the numberless "creditor" cases.

"An intent to secure a benefit to the third party" was probably suggested by cases where the performance was to be to the promisee, and the benefit to the third person was incidental.[58] It was a hasty generalization, based on the ambiguity in the words, "intended for the benefit of another." If "intent to secure a benefit" refers to the intent to exact a promise of performance to another, it is not a qualification of the rule. The motive is irrelevant. This qualification seems to have been abandoned. It is in conflict with all the "creditor" cases. It has, however, led to some unfortunate decisions, which deny relief to the only one injured, the result being that for a clear breach of contract no one can recover.[59]

It had been held that for the breach of a promise to pay a debt of the promisee, he could recover the amount of the debt. The right of the creditor was not considered in these cases. If the debt was a lien on property sold to the promisor, payment to the promisee would not satisfy the lien. The promisor was driven to a suit in equity to have the money recovered from him paid to the creditor.[60] The assignee of a term who had covenanted to pay the rent was in a like position. Deficiency decrees against grantees who had assumed liens had been made on the ground that the grantor had become a surety and the security held by him inured to the benefit of the creditor. This was a good reason, but more reasons than one may be good. These cases are not inconsistent with the right of the creditor to sue in his own right.[61] "When the law has absorbed in a broader equity the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake."[62] These two types of cases suggested that the primary liability was to the promisee. The New York courts finally reached the conclusion that the primary liability was to the creditor, and that the promisee could not sue until he had paid the debt.[63]

A grantee who assumes a lien owes the amount to someone. He cannot safely pay to the grantor. By assuming the debt he makes the debt his debt and becomes a debtor to the creditor, to whom the money is to be paid. If the grantor is personally liable, he becomes a surety. His only right is to compel payment to the creditor. If he is not liable, he has no right at all. If, on foreclosure, the land brings less than the debt, the grantee still owes the balance. If the grantor is liable, his only right is to compel payment of this balance to the creditor. If he is not liable, he has no legal, equitable, or moral right to the balance which the grantee still owes. The unpaid balance is still due to the creditor and to him only.

R. T. Holloway.

W. Va. 597, 57 S. E. 48, 11 Ann. Cas. 967, 49 L.R.A.(N.S.) 1166; Independent School Dist. v. Le Mars City Water & Light Co. 131 Iowa, 14, 107 N. W. 944, 10 L.R.A.(N.S.) 859.

[55] Jenree v. Metropolitan Street R. Co. 86 Kan. 479, 121 Pac. 510, Ann. Cas. 1913C, 214, 39 L.R.A.(N.S.) 1112.

[56] Dicey, Parties, 1st ed. 370; Pollock, Torts, 1st ed. 445–448; 27 Laws of England (Halsbury) 466, pl. 906.

[57] Ashley, Contr. 241.

[58] Williston's Wald's Pollock, Contr. 251.

[59] St. Louis v. G. H. Wright Contracting Co. 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6; Jefferson v. Asch, 53 Minn. 446, 39 Am. St. Rep. 618, 55 N. W. 604, 25 L.R.A. 257; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

[60] Williston's Wald's Pollock, Contr. 269.

[61] Burr v. Beers, 24 N. Y. 179, 80 Am. Dec. 327.

[62] Gifford v. Corrigan, 117 N. Y. 257, 15 Am. St. Rep. 508, 22 N. E. 756, 6 L.R.A. 610, 614.

[63] Williston's Wald's Pollock, Contr. 268.

The Only Witchcraft Cases Ever Tried in the South

BY W. Y. BOSWELL

Of the Tennessee Bar

IN THE heart of the great Cumberland plateau, about 70 miles east of Nashville, Tennessee, lies the beautiful little city of Jamestown. It has a population of about a thousand souls. It is the county seat of Fentress county. It was here that John M. Clemons, the father of Mark Twain, lived and practised law for many years; and it was here, according to many of the oldest residents of the county, that Mark Twain himself was born. Jamestown is the scene of much of the first part of the "Gilded Age," and is the famed "Obedstown" of this delightful story.

Jamestown also claims the distinction, enviable or otherwise, of being the scene of the only witchcraft cases ever tried south of the Ohio river. It is generally understood that the last trial for witchcraft took place in the old town of Salem, in the colony of Massachusetts, while it was yet a vassal of Great Britain, more than two hundred years ago. This general impression is erroneous.

The Marsha Millsap Case.

At page 356, Minute Book, Circuit Court Record, Fentress County, for the June Term of the Circuit Court, 1848, are to be found the following interesting entries:

State of Tennessee
v. } Libel.
William M. Bledsoe.

To Whom it May Concern:

A witch of the most extraordinary power has made her appearance in Jamestown. She can, at a single touch, convert those who have lived without stain or blemish into the most consummate rogues and rascals. She can transform members of the church into liars, sorcerers, and robbers of henroosts. She can change her neighbors' geese into her own with a single touch of her all-powerful wand. She infects those who share her bed with an overstock of loathsome vermin. She fills those with whom she converses with false ideas of her neighbor's honesty. . . .

Unless she ceases the exercise of the diabolical art she shall feel the force of public opinion turned against her.

(Signed) A. Wizzard.

The foregoing instrument was a circular, and its authorship was traced to one William M. Bledsoe, a rake in the community, and he was promptly indicted for libeling Marsha Millsaps. General John H. Savage was then attorney general for Fentress county, and under his prosecution Bledsoe was convicted and fined $25 and all the costs of the case.

A short time afterwards, Marsha, smarting under the aspersions upon her character, and joined with her husband, Hiram Millsaps, instituted suits for damages against Bledsoe and one Robert H. MacIllvain, severally, for the sum of $10,000 each, for writing and circulating libelous matter against her. The case soon came up for trial, and was tried by the following jury: Thomas Choate, John Culver, Fuller Grisham, Joseph Upchurch, Francis Davidson, James Story, William C. Davidson, David Crawford, Archibald Dishman, Abraham Terry, Martin Crouch, and Joseph Wilson, who promptly rendered judgment in favor of Marsha in the full sum of $10,000 damages in each case.

MacIllvain then brought suit against

Hiram Millsaps and his wife, Marsha, for $5,000 damages for falsely charging him with mutilating the books in the register's office, of which he had charge. The jury gave judgment in his favor for the full amount claimed. In all these cases the judgment was released by the winners upon the payment of the costs.

The First and Only Trial for Witchcraft in the South.

This case of witchcraft was in the year 1835, and originated on the banks of Obey's river, a tributary of the Cumberland, and in Fentress county, Tennessee. It was first tried before Joshua Owens, a justice of the peace at that time.

An old man named Stout, who lived in a very quiet way in the neighborhood, who did not attend church, who had been sitting up late at nights reading strange books, and about whose early history nothing was known, was suspected of being a wizard, and when a daughter of one Taylor was taken violently ill with a disease that the doctor could not diagnose, it was determined to arrest old man Stout for bewitching her.

A large posse was secured, and guns were loaded with silver bullets, for it was thought that nothing else would kill a wizard.

The old man was arrested and brought to trial before Esquire Owens. A vast array of witnesses testified as to his habits, and added that they had seen him escape from dwelling houses through the keyhole in the doors, and that he had thrown people and animals into strange spells by his influence when they were miles away from him. The officers and posse subjected him to a great many indignities, and he was held to await the action of the grand jury.

When court convened Judge Abraham Caruthers, who was on the bench, and who founded the great law school of Cumberland University, at Lebanon, Tennessee, and General John B. McCormich, the prosecuting attorney, refused to indict the old man. The action of the court and attorney general almost precipitated a riot, it is said, in the court room.

Old man Stout then sued the officers and posse for damages, and they pleaded as a defense that they were in the act of arraigning a criminal, and cited the Statutes of Henry VIII. and James I. making witchcraft a felony, which they declared had never been repealed in Tennessee. Thus ended the first and only trial for witchcraft in Tennessee by the conviction of the persons who had arrested him and subjected him to great indignities.

Under the Statutes of Henry VIII. above referred to, all witchcraft and sorcery were a felony without benefit of clergy, and Blackstone, in his Commentaries under the head, "Crimes against God and Religion," says: "Witchcraft is a sixth species of offense, and to deny it is to deny the revealed word of God."

Scarcely two centuries ago the main body of Christians believed in witchcraft, and under the solemn sanction of the law, hundreds of poor old decrepit women, condemned as witches, were tortured and died amidst blazing fagots; and to the shame of our civilization and of American jurisprudence the lurid light from some of these judicial fires is reflected upon the pages of American history. However, some of the greatest and wisest men believed in this delusion. Francis Bacon, Sir Mathew Hale, Martin Luther, John Wesley, and Cotton Mather were among the many professed believers. Great theologians contended that disbelief in witchcraft was rank heresy, and cited the Scriptures: "Thou shalt not suffer a witch to live."—Exodus, 22:18.

W. J. Bowell

Editorial Comment

Lysander said that the law spoke too softly to be heard in such a noise as war.—Plutarch.

Case and Comment

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Effect of War on Contracts Made Before the War with Alien Enemies

CONTRACTS made before the commencement of the war with an alien enemy in the enemy's country, as stated by an editorial writer in L.R.A.1917C, 650, are not void, but are either discharged as from the commencement of the war, or are suspended, according to the nature of the contracts and the extent to which they had been performed when the war broke out.

While contracts which have been so far performed on the one side as to create an indebtedness on the other are not dissolved by war, it cannot be broadly affirmed that contracts which remain executory in whole or in part at the outbreak of war are dissolved thereby. The rule favored by the consensus of judicial opinion is that such contracts are dissolved (a) where their performance, either after or during the war, is inconsistent with the duties or allegiance which the parties owe to their respective countries, as in the case of contracts which would involve trading with the enemy, or (b) where the parties would be relieved from performance on principles common to cases of intervening impossibility. The statements to be found in some of the life insurance cases growing out of the Civil War, to the effect that a contract will not be dissolved where to do so would be inequitable, are not inconsistent with the principle that future performance may be dispensed with, but simply mean that the parties are not to be left in the situation in which they were upon the outbreak of war, but are to be put *in statu quo* so far as possible.

The doctrine of revival of contracts suspended during the war is based on considerations of equity and justice, and cannot be invoked to revive a contract it would be unjust or inequitable to revive,—as where time is of the essence of the contract, or the parties cannot be made equal. Where a postponement of performance involves altering the contract itself, the contract is not merely suspended, but is dissolved. A contract is suspended only where the suspension does not involve the making of a new contract between the parties.

A contract the further performance of which would be dispensed with, in accordance with the principles above stated, may nevertheless be suspended rather than dissolved by war where the

parties have contracted to that effect. An instance in which a suspension clause in a contract has been construed not to cover the contingency of war may be found in the case of Zinc Corp. v. Hirsch [1916] 1 K. B. 541, annotated in L.R.A.1917C, 650, where it is held that a provision in a contract for the sale of goods during a period of years that "in the event of any strike, lockout, combination of workmen, interference of trade unions, suspension of labor, whether partial, local, or general, or from whatsoever cause arising, floods, storms, fire, stoppage of water supply, washaways of railways, accidents, acts of God, *force majeure* or perils of the sea, breakdown of machinery" or inability to provide the necessary means of transportation, "or in the event of any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement, then this agreement shall be suspended during the continuance of any and every such disability,"—is not to be taken as covering the contingency of war where other provisions of the contract showed that it was not the intention of the parties to suspend the provisions of the contract *in toto*, but merely to provide for the suspension of deliveries, and, as incidental thereto, of the duty of production.

Where a contract can be carried into execution notwithstanding the war, without conflicting with the allegiance of either party, it will neither be dissolved nor suspended.

It has also been held that war will not dissolve, but will merely suspend, a contract which may be performed by a single act or by periodical acts, between which there is nothing to perform, and consequently no continuity of performance.

Where the performance of an executory contract for the sale of goods involves trading with the enemy, it is dissolved by war; as is a contract of employment of a person having an enemy status.

An agreement creating a sales agency is dissolved rather than suspended by war between the countries of the respective parties.

Performance of a contract for the purchase of land is suspended during the existence of war between the country of the vendor and that of the vendee, even though it is expressly stipulated that if the payments therein provided shall not be made when due, the contract shall be void and the purchaser shall forfeit as liquidated damages all payments theretofore made thereon.

Where the lessee under a lease made before the outbreak of war becomes an alien enemy, his covenant in the lease to pay the rent is not thereby extinguished or suspended, and he may be sued for the rent that accrues during the war.

Nor is a guaranty of interest and dividends rendered invalid by the breaking out of war between the countries of the guarantor and of the guarantee.

Bay District Inns of Court

TO NEARLY every young lawyer has come the feeling that he would like to know more than he does about the best methods of:

a. Obtaining from a client a full statement of the facts of a case;
b. Of keeping office records;
c. Of striving to avoid litigation where client's interest demands it;
d. Drafting pleadings;
e. Attacking pleadings;
f. Preparation for trial, including instructions to juries;
g. Direct and cross-examination of witnesses;
h. New trials and appeals, papers and procedure;
i. Procedure before the various commissions and quasi judicial bodies such as:
   (1) Immigration.
   (2) Industrial accident.
   (3) Labor.
   (4) Railroad.
   (5) Corporation.
   (6) Insanity.
   (7) Board of health.
   (8) Board of supervisors.
   (9) Board of public works.
   (10) Police commission.
   (11) Grand jury.

Educational work along these lines, for

the benefit of graduate law students and newly admitted lawyers is the purpose of the Bay District Inns of Court of San Francisco. It is intended to supplement the law school, and does not undertake to deal with the substantive law, save in so far as it is necessarily involved in matters of pleading, practice, and procedure.

This movement was organized by young lawyers who had been members of the Law Practice Class that was conducted at the rooms of the Bar Association of San Francisco under the active direction of Mr. R. S. Gray.

The prime mover in this new organization is Mr. Peirce Coombs, formerly floor leader of the Practice Class, and deeply interested in educational work, who writes that its aims as disclosed by its articles of incorporation are:

(a) To foster and provide for education after admission to the legal profession;

(b) And thereby to advance the ability of the members of this body primarily, and others secondarily, to do their part in the service of society without losing sight of the necessity for and improvement in the ability to "make a living," but that living to be always in aid, and never to the detriment of the common good; and

(c) To assist by research, publicity, and service the obtaining for society more complete use of the instrumentalities, public and private, created, maintained, or suitable for the benefit of society.

While every other profession has been practically made over in the past twenty-five years, the conservatism of the legal profession has stood in the way of substantial changes in the rules of procedure and practice, it is declared by former Chief Justice of the supreme court of Oklahoma Jesse J. Dunn, now practising in Oakland, in a letter commending the establishment of the Bay District Inns of Court, and published in The Recorder. Former Chief Justice Dunn's comment was called forth by a letter from Mr. R. S. Gray, and is as follows:

"I have noticed the activities of the Bay District Inns of Court, and naturally feel a great deal of interest in the work that is being done under the program outlined. The legal profession is naturally so conservative that it is with difficulty that any innovation, no matter how meritorious, can receive anything like sufficient approval to be adopted. Every other profession in the world aside from ours has been almost remade within the last quarter of a century, while we have made practically no substantial change in our rules of procedure and practice. We constantly—courts, lawyers, bar association, and everybody—complain of our cumbersome methods and the delay and expense incident to them, and yet we go on using them because we have grown up with them, and it is easier to continue to use the legal wheelbarrow and ox cart than it is to change it for the expeditious legal automobile.

"The young lawyer is not so wedded to the old idols, and it is to him that we can look with greater promise of reform. He has very frequently not only the leisure and inclination, but nearly always the open mind ready to reject an obsolete rule unencumbered by any affection for an inadequate doctrine which may be deemed desirable because, 'Well, I've always done it that way.'"

A problem was presented to the students for discussion and solution at the meeting of April 26, 1917, by the visualization method used by Mr. Gray in teaching "Practice." In other words, the matter was staged for the better understanding of the students, and the various phases of statement of the problem, consultation, office memorandum made up by the attorney and recorded in shorthand, and more complete memorandum thereafter made up in similar manner, as an illustration of office methods in actual practice.

At the session of May 17th a severe drill followed as to memory and ability to orally state concisely, precisely, and accurately the facts, probative or otherwise, but without discussion of purely legal questions.

Such facts were grouped into four phases, viz.:

First. The general situation preceding the street scene.

Second. Street scene.

Third. A's acts and conclusions, ending with his posting letter.

Fourth. The telephone scene, including admissions by way of statements by A.

Thereafter an oral complaint was presented and taken in shorthand, followed by an oral demurrer (general) and argument on such issue of law before a bench of three judges consisting of visitors.

This effort to develop the power of memory and restatement in very brief and efficient form is something usually neglected in all studies both before and after admission to the bar, although of manifestly great importance.

Perhaps some of our earnest young attorneys in other localities will be glad to take up this "Inns of Court" movement.

Alien Enemy Litigants

THE right of an alien enemy to sue in the courts of this country during the present war was presented recently in the case of Cutiel v. The City of Seattle, an action in tort for personal injuries. The plaintiff, Cutiel, is a Turk who has been a resident of this country for seven and one-half years. Mr. Richard Saxe Jones appeared for the defendant, and the trial court sustained his plea in abatement.

Decision in a similar case was delivered by Justice Kelly of the New York supreme court on May 1st.

"A motion made in the supreme court," states the New York Evening Sun, "to have a damage suit dismissed on the ground that the plaintiff was 'an alien enemy,' and as such not entitled to damages, was denied by Justice Kelly, who quoted President Wilson's proclamation and advised treatment of alien enemies in 'the spirit of 1917.'

"The motion was made by Frederick J. Moses, counsel for the defendant, the Rapid Transit Subway Construction Company, which is sued by Mrs. Johanna Rosbach, of 18 Lincoln place, Brooklyn, for $25,000 for injuries sustained at Seventh avenue, near Thirty-fourth street, on December 4th, 1915.

"In support of his motion Mr. Moses cited court decisions on this question from the War of 1812 and the Civil War. He pointed out that while Mrs. Rosbach's husband, Henry, had renounced allegiance to the Kaiser in February, 1916, he was not yet a citizen, and should be regarded as nothing but an alien enemy.

"In denying the motion Justice Kelly quoted from the President's proclamation the passage which ends as follows:

". . . 'toward such alien enemies as conduct themselves in accordance with the law, all citizens of the United States are enjoined to preserve the peace and treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.'

" 'The opinions in the cases which you have cited are ones to which the utmost respect are due,' said Justice Kelly to the counsel for the defense. 'They have been passed upon by the highest courts, but we must remember that they hark back one hundred years or more. We must adjust ourselves to the conditions which exist to-day.

" 'I have read an extract from the President's proclamation. That, sir, is the spirit of 1917, and, for one, I think we should be proud of it—I am.

" 'The President has spoken. He is right. The defendant comes within the boundaries set by him. Your motion to dismiss the complaint is denied. The stenographer will note an exception by counsel for defendant. Proceed with the case."

These decisions seem to be in direct conflict.

Readers' Comments

Editor CASE AND COMMENT:

In connection with your editorial in the May, 1917, issue of CASE AND COMMENT, A Ghost from the Past, the following quotations from Henry C. Lea's excellent little book, Superstitution and Force, (Philadelphia, Henry C. Lea, 1878) may be of interest to your readers. He classifies bier-right as a form of ordeal, and defines it, on pp. 315, 316, as follows:

"The superstition that, at the approach of a murderer, the body of his victim would bleed, or give some other manifestation of recognition, is one of ancient origin, and under the name of 'bier-right,' has been made a means of investigation and detection."

On pp. 322, 323 he gives the following comparatively recent instances of this mode of proof:

"The vitality of superstition is well illustrated by transmission of belief in the bier-right even to our own day. In 1767, the coroner's jury of Bergen county, New Jersey, was summoned to view the body of Nicholas Tuers, whose murder was suspected. The attestation of Joannes Demarest, the coroner, states that he had no belief in the bier-right, and paid no attention to the experiment, when one of the jury touched the body without result. At length Harry, the slave who had been suspected without proof, was brought up for the same purpose, when he heard an exclamation, 'He is the man,' and was told that Tuers had bled on being touched by Harry. He then ordered the slave to place his hand on the face of the corpse, when about a tablespoon full of blood flowed from each nostril, and Harry confessed the murder in all its particulars. Annual Register for 1767, pp. 144, 145. In 1833, a man named Getter was executed in Pennsylvania for the murder of his wife, and among the evidence which went to the jury was that of a female witness who deposed: 'If my throat was to be cut, I could tell, before God Almighty, that the deceased smiled when he (the murderer) touched her. I swore this before the justice, and also that she bled considerably. I was sent for to dress her and lay her out. He touched her twice. He made no hesitation about doing it. I also swore before the justice that it was observed by other people in the house. Dunglison's Human Physiology, 8th ed. II. 657. Nor is the belief even yet eradicated from the minds of the uneducated. In 1860, the Philadelphia journals mentioned a case in which the relatives of a deceased person, suspecting foul play, vainly importuned the coroner, some weeks after the interment, to have the body exhumed, in order that it might be touched by the person whom they regarded as concerned in his death. In 1868, at Verdiersville, Virginia, a suspected murderer was compelled to touch the body of a woman found in a wood; and in 1869 at Lebanon, Illinois, the bodies of two murdered persons were dug up, and two hundred of the neighbors were marched past them, each of whom was made to touch them in the hope of finding the criminals. (Phila. Bulletin, April 19, 1860; N. Y. World, June 5, 1868; Phila. North American, Mar. 29, 1869.)"

It is also interesting in this connection to recall that in England the right to trial by battle was recognized as late as 1818 in Ashford v. Thornton, 1 Barn. & Ald. 457, 106 Eng. Reprint, 149, and that in 1824 a defendant appeared in an English court with eleven conjurators at his back to defeat an action of debt by wager of law or compurgation. King v. Williams, 2 Barn. & C. 528, 107 Eng. Reprint, 483. The right to trial by battle was abolished in England by 59 Geo. III. chap. 46, and the wager of law by 3 and 4 Wm. IV. chap. 42, § 13. The learned author of "Superstition and Force" ventures the opinion that wager of law and probably wager of battle still preserved a legal existence in states of this country, the first as late as 1811 and the other as late as 1837, and cites very respectable authority for his opinion.

A. J. Buscheck.

Milwaukee, Wis.

Enemy Sympathizers Not Protected by Federal Constitution.

EDITOR OF CASE AND COMMENT:

In reply to Dean Henry W. Ballantine's criticism in June Case and Comment of third report of New York State Bar Association Committee upon the duty of courts to refuse to execute statutes in contravention of the fundamental law, I beg to say:

During a national war with any first-class power the Federal Constitution does not inure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign. All spies should be forthwith tried by court-martial and if convicted shot (U. S. Rev. Stat. § 1343, Comp. Stat. 1916, § 2448). Enemy sympathizers, after conviction by court-martial, should be either confined at hard labor during the war or else should be deported to the enemy country, as was Vallandigham.

In 1863 Vallandigham, the state leader of a great party in Ohio, publicly sympathized with the Confederacy. Ohio was not at that time invaded. Vallandigham was tried by court-martial, was convicted of sedition and sympathizing with the Confederacy, and was sentenced to confinement in a fortress during the war. The Supreme Court refused to interfere (Ex parte Vallandigham, 1 Wall. 243, 251, 254, 17 L. ed. 589, 593, 594).

By way of commutation of sentence he was then deported to the Confederacy.

In 1904, Peabody, then governor of Colorado, declared a county to be in a state of insurrection and ordered one Moyer to be arrested as a leader of the outbreak and detained by the National Guard until he could be safely discharged, and then to be delivered to the civil authorities. This was done purely as a military arrest and confinement without any civil process. It does not appear that the civil courts in the county were closed during the insurrection. After the termination of the insurrection, Moyer sued the former governor, the former adjutant general of the National Guard, and the captain of the company which arrested and confined him, for an alleged wrongful imprisonment.

The Supreme Court unanimously upheld the acts of the governor and the militia. Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235.

In 1901, during the Boer War, a South African was arrested by order of the military authorities, removed 300 miles from his home, and confined in a civil jail by order of the military in a district in which, while martial law prevailed, the civil courts remained open. The Privy Council upheld the arrest and confinement. Ex parte Marais [1902] A. C. 114, 71 L. J. P. C. N. S. 42, 50 Week. Rep. 273, 85 L. T. N. S. 734, 18 Times L. R. 185.

In 1902, during the Boer War, convictions of imprisonment at hard labor, and fines under martial law, by an administrator of martial law for acts contravening martial-law regulations against sedition and unlawful travel and removal, were upheld though made by the same person, who was also the civil magistrate, and whose civil court was open at the time. Atty. Gen. v. Van Reenen, 118 A. C. [1904], 73 L. J. P. C. N. S. 13, 89 L. T. N. S. 591, 20 Times L. R. 90.

In 1914 a New Zealand reserve officer not in actual service went to Samoa after its capture and after all German resistance had ceased, and violated war regulations by exporting gold coin from Samoa, carrying personal letters from German prisoners there to their friends interned in New Zealand, and carrying photographs of captured German wireless stations as well as manuscript for the editors of two New Zealand papers. He was taken back to Samoa, tried there before a military court, convicted, and sentenced to five years' imprisonment in New Zealand.

The New Zealand supreme court upheld the conviction and sentence. Re Gaudin, 34 N. Z. L. R. 401.

In 1915 a South African was arrested for violating a martial-law regulation forbidding seditious language, and held for trial before a special military court. The Boer rebellion in South Africa did not break out until after the alleged sedition was committed, and the civil courts remained open.

The supreme court of South Africa refused to enquire into the matter or to restrain the military court from trying all those charged with violating the martial-law regulations, notwithstanding that the civil courts remained open.

Krohn v. Minister for Defence, South African L. R. (1915) Appellate Division, 191, 197–212.

In 1915 an Australian statute authorizing the detention and confinement in military custody during the war of any naturalized person whom the minister of defence believed to be disaffected or disloyal, without the production of any evidence whatever, was upheld on the principle of the necessity of a dictatorship during a national war. Lloyd v. Wallach, 20 C. L. R. (Austr.) 310.

Stieber, the chief of the Prussian spies in the wars of 1866 and 1870, says in his memoirs that in the presence of von Bismarck he told an officer of the Prussian General Staff that his (invisible) army of 30,000 Prussian spies was as much a Prussian "army" as the (visible and much larger) "fighting army" of von Moltke, and that von Bismarck tacitly admitted it (Lanoir, German Spy System in France, 70–72).

The Milligan Case, 4 Wall. 2, 18 L. ed. 281, is not in point. The only question actually there decided was the legal, but not constitutional, question, that the statute relied upon as a basis for the military courts did not in fact give authority to establish them in the places where they were set up.

New York City. HENRY A. FORSTER.

Among the New Decisions

What is just and right is the law of laws.—Proverb.

Adverse possession — taking — possession of executor. That possession of real estate by an executor with power of sale may be tacked to that of his testator in establishing a title by adverse possession, is held in the North Carolina case of Vanderbilt v. Chapman, 90 S. E. 993, annotated in L.R.A.1917C, 143. This case is in harmony with the rule that the possession of an administrator is a continuation of, and may be tacked to, that of his intestate, when as administrator he has the right by statute to take possession and control of his intestate's real estate, and actually does so.

Attorney and client — contract procured by solicitation — validity. The mere fact that a contract employing an attorney to perform legal services was procured through solicitation is held not to render it void as against public policy in Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, annotated in L.R.A. 1917B, 1123. A distinction has been recognized by some courts between solicitation of business by attorneys personally and solicitation by them through persons whom they have employed to procure business for them, the right of attorneys to solicit personally being considered in a more favorable light than the practice of solicitation through runners. This distinction was strongly emphasized in Chreste v. Com. (1916) 171 Ky. 77, 186 S. W. 919, in which the court regarded the foregoing decision as a case where the right of an attorney personally to solicit business was involved, and said: "But there is a very wide difference between the unprofessional and undignified practice of personal solicitation of business and the indefensible and vicious practice of employing agents and runners who are not lawyers to go about the country soliciting business and stirring up strife and litigation for a stipulated consideration or a contingent fee. Such agents and runners as these are not restrained in their activities by any professional or ethical sense of propriety. Their sole object is to secure clients for their employers, and they use in this effort such arts and schemes as will get results, without giving any thought or attention to the disturbing and objectionable nature of the business in which they are engaged. The friends, acquaintances, and associates of an attorney have, of course, the unquestionable right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services. But there is a manifest difference between securing business through the influence and efforts of friends, acquaintances, and associates, and securing it through the methods employed by the strictly commercial enterprise of hired agents. And it would seem at first impression to

strike any fair-minded man, whether lawyer or not, as being highly improper for an attorney to have agents or runners to go about and make their living by securing for him employment in cases he would not otherwise get. While the personal soliciting of business by an attorney has been held not to render the contract of employment obtained thereby unenforceable, recovery for services has been denied an attorney where it appeared that his employment was obtained through solicitation by one not an attorney with whom the attorney had entered into an agreement to procure business for him.

Bond — of cashier —extent of obligation. A paid surety of a bank cashier upon a bond required by statute, it is held in United States Fidelity & G. Co. v. Poetker, 180 Ind. 255, 102 N. E. 372, cannot avoid the statutory obligation that the cashier will honestly and faithfully discharge the duties of his office, by the insertion in the bond and application of conditions making the enforcement of the undertaking difficult. The effect of the insertion of unauthorized provisions in a bond required by statute is treated in the note appended to the foregoing decision in L.R.A.1917B, 990.

Carrier — injury — liability. One who took passage upon a freight train without payment of fare, with the consent of the engineer, and rode upon a flat car loaded with rock, from which he was thrown by a violent jerk of the train and injured, is held in the Minnesota case of Tuder v. Oregon Short Line R. Co. 160 N. W. 785, L.R.A.1917C, 86, not to have been a passenger while so riding upon the freight train. The engineer was without authority to accept him as a passenger, and he was in fact and law a trespasser thereon.

Chattel mortgage — future crop — quantity. A mortgage of 200 bushels of corn from the crop of a certain year on a certain farm is held good as against creditors, if no more than the amount specified is raised, in Mitchell v. Abernathy, 194 Ala. 608, 69 So. 824, annotated in L.R.A.1917C, 6.

Chattel mortgage — growing crops —additional acreage. A mortgage of 15 acres of cotton and other specified crops, "and all other crops" the mortgagor may be interested in on a certain farm, is held to carry cotton on 10 additional acres of that farm, as against a subsequent mortgage of the cotton to be grown on such 10 acres, in First Nat. Bank v. Cazort & McG. Co. 123 Ark. 605, 186 S. W. 86, annotated in L.R.A.1917C, 7.

Chattel mortgage — on crops to be grown — validity. A mortgage of a crop of tobacco to be grown is held not valid in Cheatham v. Kelley, 170 Ky. 429, 186 S. W. 128, annotated in L.R.A. 1917C, 1, as against an assignment of the crop by the mortgagor for the benefit of his creditors after it comes into existence, although the plants were growing in a plant bed at the time the mortgage was executed, if they had not yet been set out.

Constitutional law — employment agency — forbidding taking of fee. That no constitutional rights are infringed by forbidding the taking of a fee or commission for securing employment for workers is held in the Washington case of State v. Rossman, 161 Pac. 349, annotated in L.R.A.1917B, 1276.

Constitutional law — requiring statement of cause of discharge — impairing rights. That requiring an employer to give a discharged employee a true statement of the cause of discharge would unconstitutionally impair the employer's right to contract, and deny him the equal protection of the laws, is held in St. Louis Southwestern R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, annotated in L.R.A.1917B, 1108. The foregoing decision has been followed in Galveston, H. & S. A. R. Co. v. King (1915) — Tex. Civ. App. —, 174 S. W. 335, and in Galveston, H. & S. A. R. Co. v. State (1914) — Tex. Civ. App. —, 175 S. W. 1096. In the latter case Jenkins, J., dissented, notwithstanding the binding force of the higher court decision, and stated his arguments with great clearness and force.

Contempt — failure to pay alimony. A man who has no money or tangible

property, it is held in the Oklahoma case of Fowler v. Fowler, 161 Pac. 227, annotated in L.R.A.1917C, 89, may be punished for contempt of court in failing to pay alimony adjudged to be paid by him, if he makes no honest effort, considering his physical and mental capabilities, to work and earn money to pay the same. This case follows the somewhat indefinite cases of Lester v. Lester (1879) 63 Ga. 356, and Lansing v. Lansing (1871) 41 How. Pr. 248, and does not agree with the direct decision to the contrary in Messervy v. Messervy, 30 L.R.A. (N.S.) 1001, and with the earlier cases of Ex parte Todd (1897) 119 Cal. 57, 50 Pac. 1071, and Webb v. Webb (1903) 140 Ala. 262, 103 Am. St. Rep. 30, 37 So. 96. (Lansing v. Lansing, supra, was reversed in (1871) 4 Lans. 377, on the ground that under the statute the attachment for the nonpayment of the costs and alimony was unauthorized because an execution could have been awarded for their collection, such statute excepting such a case from those in which a party may be punished as for a contempt for the nonpayment of money.)

Damages — breach of warranty of seed. The damages for breach of warranty that seed sold to produce a crop for market is true to name are held, in the Tennessee case of Ford v. Farmers' Exchange, 189 S. W. 368, L.R.A.1917B, 1106, in case the purchaser acts in ignorance of the breach, to be the value of a crop, had the seed been as warranted, such as would ordinarily have been produced that year less the value of the one actually produced.

Discrimination — payment — cash deposit — new consumers. That an electric company may require a moderate cash deposit, such as $5, from new consumers, although none is required of old consumers, is held in the New Jersey case of Case v. Boonton Electric Co. P.U.R.1917A, 698.

Discrimination — rates — gas — light and fuel. That there should be no substantial difference in gas rates for lighting and fuel purposes is held in the Maine case of Murchie v. St. Croix Gaslight Co. P.U.R.1917B, 384. Gas rates may be graded according to the quantity used, but the differences should not be extreme.

Discrimination — rates — reduced rates to owners of equipment. Railroad freight rates, it is held in the Michigan case of Grand Rapids Live Stock Co. v. Pere Marquette R. Co. P.U.R. 1917B, 310, must be determined without regard to the fact that the shipper furnishes and maintains the cars, though the carrier may pay a reasonable compensation therefor to the shipper, where the statute declares it unlawful for a common carrier to receive less compensation for any service in consideration of the shipper furnishing any part of the facilities incident thereto. Annotation on reduced rates to owners of equipment accompanies the report of the above case in P.U.R.

Divorce — imprisonment. One of the causes for divorce under the Minnesota statute is sentence to imprisonment in any state prison or reformatory subsequent to the marriage. It is held in Long v. Long, 160 N. W. 687, annotated in L.R.A.1917C, 159, that the language does not limit the cause to future sentences of imprisonment; the only limitation being that the sentence must be one imposed after the marriage.

Electricity — injury to trespasser — liability. An electric company which permits its wires to sag so low over a railroad track as to endanger persons on the top of cars cannot, it is held in the North Carolina case of Ferrell v. Durham Traction Co. 90 S. E. 893, L.R.A. 1917B, 1291, escape liability for their throwing a person off a car by the fact that he was a trespasser on the train.

Embezzlement — failure to pay over money. That proof of a mere failure to pay over money, standing alone, will not support a judgment of conviction for embezzlement, is held in the Oklahoma case of Blake v. State, 160 Pac. 30, annotated in L.R.A.1917B, 1261. This is the rule, unless the particular statute under which the indictment is found, em-

bezzlement being the creature of statute, specifies that a mere failure to pay over money shall constitute embezzlement.

Evidence — conditional character of note. Parol evidence, it is held in the Oregon case of Colvin v. Goff, 161 Pac. 568, is not admissible in an action on a promissory note given in consideration of money advanced to pay the expenses of an appeal in a criminal case, to show that the note was to be paid only in case of reversal. This case is accompanied in L.R.A.1917C, 300, by a note on the admissibility of parol evidence to show that a bill or note was delivered upon condition.

Fraud — representations — condition of land. Representations that land was in good condition for cropping relate to matters of fact, and not opinion, and where the land is not in good cropping condition owing to its being so infested with obnoxious weeds as to render it unfit for immediate successful cropping, the representation being false in this regard, and being relied upon by the vendee to his injury, he is held entitled, in the Minnesota case of Woodward v. Western Canada Colonization Co. 158 N. W. 706, annotated in L.R.A. 1917C, 270, to rescind a contract for the purchase of the land induced thereby, although he was on the land and in part inspected it.

Highway — excavation — negligence. Leaving an unguarded excavation adjoining a street crossing so that slight deviation from the crossing will cause one to fall into it may be found to be negligence, it is held in the Iowa case of Balcom v. Independence, 160 N. W. 305, annotated in L.R.A.1917C, 120, with respect to a blind person who, in attempting to use the crossing, so falls to his injury. The position taken in this case, that while the city owes no one more than ordinary care toward a blind person in respect of the condition of the streets, the effect of one's blindness or defective eyesight may be considered in determining whether that degree of care has been exercised, seems a natural conclusion from the premise that blind persons have as much right to use the street as those having sight, and in harmony with the view that the blindness of the person injured is a proper matter for consideration in determining whether or not he has exercised the degree of care incumbent upon him to avoid the imputation of contributory negligence. Some of the cases in discussing the question of contributory negligence on the part of blind persons have used language implying that the municipality or other party responsible for the condition of the sidewalk owes no greater care to a blind person than to other persons using the streets. This may, however, have been due to the failure to observe carefully the distinction between the degree of care and the amount of care, or to realize that precautions which may satisfy the rule of reasonable care in case of a person in full possession of his faculties may not satisfy that degree of care in case of a blind person.

Highway — reservation of right of use — validity. An attempted reservation by one dedicating land to the public for streets, of the right to lay water, gas, and electric conduits therein, and operate railways thereon, is held void as against public policy, in Bradley v. Spokane & I. E. R. Co. 79 Wash. 455, 140 Pac. 688, annotated in L.R.A.1917C, 225. The rule is announced in some cases that a reservation cannot be annexed to the dedication of a highway, which will destroy its chief characteristic as a public way. This limitation is put in another form in a case involving a reservation of railway rights. It is stated that the reserved right should not be construed as giving the dedicator power to enable a railway to wholly occupy and use the street, to the entire exclusion of the general public. Under cases which take this view, it becomes a question whether the reservation involved is one which destroys the chief characteristic of the street or highway. It is the view of some courts that a reservation in a dedication of land for a public street, of the right to occupy the street with railway tracks or for railway purposes, does not conflict with its use as a highway. In other cases sustaining the validity of

a reservation for railroad purposes, there is no discussion of the general theory that it must not interfere with the public use; it is simply stated that a dedication of a highway to the public may be made *cum onere*, and held that, when a dedicator who has thus reserved the right to maintain a railroad in the street, or to assign this right, has devoted the street to railroad purposes, the easement of the public highway is suspended, and continues suspended so long as it is devoted to railroad purposes. Cases involving other reservations than for railroad purposes have followed this broad rule, that land may be dedicated for highway purposes *cum onere*. It has been held that an exclusive reservation by the founders of a city who dedicate land for street purposes, of the right to operate practically all the public utilities in the streets without any restriction whatever, is void on the ground that a monopoly is thereby created, and that the municipal authorities are thereby unduly bound in their control over the public interests.

Husband and wife — illegal marriage — necessaries — liability. That one who has gone through a former marriage with a woman already married to another, and who lives with her and holds her out as his wife, cannot defeat a claim for necessaries furnished her, by setting up the illegality of the marriage, is held in Frank v. Carter, 219 N. Y. 35, 113 N. E. 549, annotated in L.R.A.1917B, 1288. Reason and justice seem to demand that a man should not be permitted to live with a woman, allowing her the use of his name and representing her to be his wife, and then escape liability for necessaries furnished her on credit by third persons, by showing that she is not in fact his wife. Accordingly, the cases are substantially agreed that a man living with a woman as his wife, holding her out and representing her to the world as such, is liable for necessaries furnished her on credit by third persons. He is estopped from denying that the relationship of husband and wife exists between them in order to escape liability. For stronger reasons, if anything, the same rule likewise obtains where the parties have gone through a marriage ceremony which is afterwards found to be invalid and of no effect.

Injunction — against action to recover property. Equity, it is held in the West Virginia case of Charleston Hardware Co. v. Warner Elevator Mfg. Co. 90 S. E. 674, L.R.A.1917C, 75, will not enjoin the seller from prosecuting an action of detinue to recover from the buyer a chattel, sold and delivered on condition that the title thereto was to remain in the seller until it was fully paid for, on the ground that he has broken his contract, thereby entitling the buyer to a right of action for damages. No other case has been found considering the specific question of the right to enjoin an action by the seller of property on conditional sale to recover the property, on the ground that the property did not comply with the contract of sale, or that it was not as represented or warranted.

Injunction — to prevent cutting timber. That an injunction lies at the suit of an owner of land in possession to prevent the threatened removal of the timber therefrom by a stranger, although he is solvent and is acting under a claim of right, is held in the Alabama case of Tidwell v. H. H. Hitt Lumber Co. 73 So. 486, accompanied by supplemental annotation in L.R.A.1917C, 232.

Insurance — gasolene on premises — effect. The temporary possession on the premises of a few quarts of gasolene to clean an automobile and vulcanize the tires is held not within the clause of an insurance policy making it void if gasolene is kept, used, or allowed on the premises, in Home Ins. Co. v. Bridges, 172 Ky. 161, 189 S. W. 6, annotated in L.R.A.1917C, 276. Clauses that certain articles shall not be kept, used, or allowed on the insured premises, have generally been construed to have reference to a permanent keeping or using of the designated articles in considerable quantities, and have been held not violated by the temporary use of a small quantity of the articles prohibited.

These provisions, however, have been held to be violated by keeping gasolene

or a gasolene stove for regular use on the premises, by storing a large quantity of the prohibited article on the premises, and by the manufacture of the prohibited articles contrary to custom.

Insurance — mistake in changing mortgagee clause — reformation. That a mortgagee clause procured to be changed by brokers of an assignee of the mortgage in order to protect his interests through a notation, "interest vested in assignee by name, loss payable as heretofore," which results in an indorsement that the interest is vested in the person named "as owner," loss payable to former mortgagees, his assignors, cannot be reformed after loss so as to make the loss payable to him, as the mistake was not mutual, so as to justify reformation of the contract, is held in Salomon v. North British & M. Ins. Co. 215 N. Y. 214, 109 N. E. 121, annotated in L.R.A.1917C, 106.

Insurance — violation of law — forfeiture. A certificate of membership in a fraternal beneficiary society provided that if the death of a member holding such certificate shall occur in consequence of any violation, or attempted violation, of the laws of any state or territory or of the United States, "then the certificate shall be null and void and of no effect." The holder of such a certificate, while he was in the act of committing a violent and unprovoked assault upon another, was shot and killed by the person whom he was assaulting. It is held in the Nebraska case of Bosler v. Modern Woodmen, 160 N. W. 966, annotated in L.R.A.1917C, 195, that no recovery can be had by his beneficiary upon such certificate.

Intoxicating liquors — prohibiting introduction into state for personal use — validity. A constitutional prohibition of the introduction of intoxicating liquor into the state, under penalty, it is held in Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050, L.R.A.1917B, 1230, cannot prevent its introduction for mere possession or personal use, where such possession or use is not otherwise made unlawful, under the Webb-Kenyon Act, prohibiting the transporting from one state to another of intoxicating liquor intended to be received, possessed, sold, or in any manner used in violation of the state law.

Judicial sale — growing crop. A sale made by the lawful occupants of land which had been sold on execution, of a crop of corn which he had grown thereon, is held in Myers v. Steele, 98 Kan. 577, 158 Pac. 660, annotated in L.R.A.1917C, 4, to pass a good title as against the grantee under the sheriff's deed, provided that, at the expiration of the period allowed for redemption, it is ripe in the sense that it has ceased to draw sustenance from the soil, notwithstanding it is not then fit to husk and put in a crib, or to market.

Landlord and tenant — liability of agent for injury to tenant. The agent for the care and rental of an apartment house is held not personally liable for injuries to a tenant through a defect in a common passageway, in the Iowa case of Cramblitt v. Percival-Porter Co. 158 N. W. 541, annotated in L.R.A.1917C, 77.

Limitation of actions — secret removal of ore — fraud. The secret removal of ore beyond the boundary line of a mine is held in the Washington case of Golden Eagle Min. Co. v. Imperator-Quilp Co. 161 Pac. 848, annotated in L.R.A.1917C, 113, not such fraud that the limitation period begins to run from its discovery rather than from the time of the trespass.

There is a decided conflict of authority upon the question when the Statute of Limitations begins to run against a cause of action based upon a wrongful removal of minerals from real property, some of the courts maintaining that there is no distinction between an underground and a surface trespass, and, therefore, that the general rule that the statutory period begins when the trespass is committed applies, and other courts declaring that an underground trespass, accompanied by the taking of minerals, constitutes a fraud and fraudulent concealment, especially where the taking was intentional and wilful, so that

the statute does not begin to run until discovery of the trespass.

In the above decision one whose underlying ore had been secretly mined by means of an underground tunnel from adjoining lands attempted to excuse his delay in bringing the action for damages caused by the trespass as against a plea that the action was barred under a statutory requirement that actions for trespass on real property be brought within three years, by contending that the action was one falling within the provision that a cause of action for relief upon the ground of fraud should not be deemed to have accrued until the aggrieved party's discovery of the facts constituting the fraud. In this case the court refused to assent either to the doctrine that the fact that the trespass was underground and, therefore, not easily discoverable, and was in fact secretly carried on, justified a holding that the secret trespass was in effect a fraud which would permit maintenance of an action within the statutory period after the discovery thereof, or that the injustice of the conclusion reached worked a hardship sufficient to justify a different conclusion.

But contrary to the decision reached in the foregoing case, it has been expressly held that a secret and wilful taking of minerals by one person from another's property through underground openings without the latter's consent or knowledge creates a cause of action which falls within a statutory provision that an action for relief on the ground of fraud should not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, and this regardless of whether such action and the relief asked be classed as legal or equitable. Lightner Min. Co. v. Lane (1911) 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093.

It is of interest to note that in a number of jurisdictions statutes have been enacted by which it is in effect provided that the time does not commence to run against a cause of action for underground trespass to real property until the facts constituting the trespass have been, or should by the exercise of reasonable diligence have been, discovered. For example, statutes of this character have been enacted in Montana, Nevada, New Mexico, Ohio, and Utah, and possibly in other jurisdictions.

Master and servant — forbidding discharge of employee without hearing — constitutionality. Forbidding a railroad company to discharge an employee upon information touching his conduct without an opportunity to be heard in the presence of the one furnishing the information is held to deprive it of its constitutional right to liberty and to acquire property, in the Massachusetts case of Re Opinion of Justices, 108 N. E. 807, annotated in L.R.A.1917B, 1119, which further holds that railroad companies are deprived of the equal protection of the laws, and special privileges are conferred upon their employees, by forbidding the discharge of a railroad employee upon information furnished by any person without giving him an opportunity to be heard in the presence of the informer.

Most of the cases passing upon the constitutionality of statutes restricting the right of the employer to discharge the employee involve statutes designed to prevent discrimination against labor unions, and the foregoing case makes that class of cases the main basis of the decision. However it may be in the future, the past reveals a practically unbroken line of decisions holding that all statutes that in any way restrict the right of the employer to discharge the employee without any cause or without a hearing are unconstitutional as violations of the contract clause of the Constitution.

Courts have apparently taken the view that the employee is as much benefited by this unyielding principle as the employer is.

Municipal corporations — collapse of bathhouse — liability. A municipal corporation is held not liable in the Massachusetts case of Bolster v. Lawrence, 114 N. E. 722, L.R.A.1917B, 1285, for injury caused by the collapse of a structure erected and maintained under statutory authority as a bathhouse for the free use of the public, although it is author-

ized to make a small charge for accommodations furnished.

Municipal corporations — ordinance — transportation of milk — reasonableness. An ordinance forbidding a common carrier to transport milk when warmer than a specified temperature is held unreasonable in Chicago v. Chicago & N. W. R. Co. 275 Ill. 30, 113 N. E. 849, where the milk is also required to be in sealed cans, the seals of which cannot be broken, and the milk is offered for transportation at stations where no other business is transacted.

This seems to be the only case involving the validity of a regulation as to the temperature at which milk shall be transported. It is accompanied in L.R.A.1917C, 238, by a note on the validity of regulations as to milk.

Nuisance — pigpens. The maintenance of a yard and pens in which numerous pigs are kept adjoining a summer cottage on neighboring property is held not a nuisance which can be enjoined, in the Wisconsin case of Clark v. Wambold, 160 N. W. 1039, annotated in L.R.A.1917C, 211, if they are kept with reasonable cleanliness; at least if the yard and pens were in existence when the cottage was built.

It has been considered that a man is entitled to have the air about his dwelling house free from the odors of hogs and their quarters as a matter of his reasonable comfort, and that he is not delicate or sensitive in demanding it; and that if such odors exist, it is not a question whether the pigs and pens are well kept, or whether his health is endangered.

It will be observed that in the foregoing case the court does not rest its decision simply upon the finding that the effect of the odors was not such as to interfere materially with the enjoyment of the plaintiff's premises, or materially impair their use by people of ordinary sensibilities, but that it goes further and asserts unqualifiedly the doctrine that the odors from a pigpen on a farm will not make an actionable nuisance. This is a new doctrine.

Partnership — sale in bulk. A sale of the goods and assets of the partnership may be made by the surviving partner in bulk or in the usual course of trade, whichever may be the most advantageous to the interested parties, and if sold at retail some goods may be added to the stock in order to make it more salable and to facilitate the advantageous disposition of the whole; and when this is done in good faith, it is held in the Kansas case of Big Four Implement Co. v. Keyser, 161 Pac. 592, annotated in L.R.A.1917C, 166, that the estate will be liable for the goods purchased as well as the expenses of winding up the business.

It should be observed however, that it is said in the foregoing case that this rule is applicable only where the additional goods are purchased in good faith to enable the surviving partner to close the stock out in the usual course of trade, in case that method is more advantageous than a bulk sale of the merchandise.

Although but few cases have passed upon the question, it seems to be settled that purchases may be made where necessary in order to successfully close up the partnership business, but not otherwise.

Thus, it has been held that a surviving partner in a mercantile business may make small purchases of some articles of the stock to render it more salable, and to facilitate an advantageous disposition of the whole.

Perjury — contradictory statements — effect. That contradictory statements under oath will not alone convict one of perjury is held in the Michigan case of People v. McClintic, 160 N. W. 461, annotated in L.R.A.1917C, 52.

While there are a few early cases to the contrary, some of which are probably of doubtful authority, the rule is now well established that a conviction of perjury cannot be had upon proof alone that accused made contradictory statements.

Proximate cause — explosion — leaving explosives unguarded. Wrongfully leaving explosives stored in a public place is held not the proximate cause

of the injury, in Perry v. Rochester Lime Co. 219 N. Y. 60, 113 N. E. 529, L.R.A.1917B, 1058, where boys take an unmarked box of explosives from the unlocked chest where it was stored, and, after concealing it over night, attempt to make some use of it the next day, when an explosion occurs, to the injury of a playmate who is with them.

Railroad — licensee drawn under train — liability. A railroad company is held not bound in Louisville & N. R. Co. v. Lawson, 161 Ky. 39, 170 S. W. 198, annotated in L.R.A.1917B, 1161, to modify the speed of its train in passing a licensee walking along its track with knowledge of the approach of the train, to prevent his being drawn under the train. This decision appears sound. While it is apparently placed, in part at least, on the ground that such an occurrence, if possible, is nevertheless so improbable as not to be reasonably anticipated by the exercise of ordinary care, yet, apart from this, the decision is sustainable on the ground that those in charge of the train have a right to assume that a licensee walking along the track, who sees the train approaching, will get far enough away from the track to avoid being drawn under the train, if there is danger from suction, as they have a right to assume that a trespasser who sees the train approaching will leave the track; and in the latter part of the opinion the court intimates that its conclusions rest partly, at least, on the latter ground.

In cases of injury to persons lawfully on station platforms as a result of suction or wind from a rapidly passing train, the courts have generally held that the questions of negligence and contributory negligence were for the jury, and have assumed apparently that recovery for such an injury is not precluded on the ground that it should not reasonably be anticipated.

Rates — interurban railways — factors. That the operation of large and heavy cars over a private right of way at a comparatively high speed are factors to be considered in fixing interurban railway rates is held in the New Jersey case of Re New Jersey & P. Traction Co. P.U.R.1917A, 72.

Rates — power of Commission — emergency — temporary rates in interim between rate ordinance and referendum. That the interim between the passage of a rate ordinance and a vote on a referendum petition does not create an emergency within the emergency section of the Ohio Public Utilities Law that would permit the Commission to fix a temporary rate is held in the case of Re Cincinnati Gas & E. Co. P.U.R. 1917A, 425.

Return — pensions — sick and accident benefits. That an appropriation from the surplus of a telephone company as a reserve for the payment of pensions and sick and accident benefits to its employees, without assessment, abatement of wages, or contribution on their part, is in accord with the laws of Colorado governing Workmen's Compensation, is held in the Colorado case of Re Mountain States Teleph. & Teleg. Co. P.U.R. 1917B, 198.

Sales — encouraging immoral business — recovery of purchase price. One, it is held in the Nevada case of Loose v. Larsen, 161 Pac. 514, annotated in L.R.A.1917B, 1166, is not prevented from recovering the purchase price of liquors sold for resale to one having a license to deal in them by the fact that the resale will incidentally encourage the business of a house of ill fame conducted by the buyer on the premises where the liquors are to be sold.

In harmony with the foregoing decision, that a vendor of goods who does not participate in the running of a house of ill fame, or do anything in furtherance thereof, may recover the purchase price of the goods, though he knew that the vendee intended them to be kept and used in such a house, are: Hollenberg Music Co. v. Berry (1907) 85 Ark. 9, 122 Am. St. Rep. 17, 106 S. W. 1172 (sale of piano); Belmont v. Jones House Furnishing Co. (1910) 94 Ark. 96, 140 Am. St. Rep. 112, 125 S. W. 651 (sale of furniture); Schankel v. Moffatt (1893) 53 Ill. App. 382 (sale of furni-

ture); Hubbard v. Moore (1872) 24 La. Ann. 591, 13 Am. Rep. 128 (sale of furniture); Sampson Bros. v. Townsend (1873) 25 La. Ann. 78 (sale of furniture); Anheuser-Busch Brewing Asso. v. Mason (1890) 44 Minn. 318, 9 L.R.A. 508, 20 Am. St. Rep. 580, 46 N. W. 558 (sale of liquor); Washington Liquor Co. v. Shaw (1905) 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153 (sale of liquor).

There have been a few cases that have denied the recovery for goods sold to a prostitute. In some of the cases, however, the vendor was considered to have participated in the running of the house of ill fame, or to have done something in furtherance thereof.

Security issues — consideration affecting issues — economic effects of European War. Authority to issue securities to construct an interurban railroad will not be denied merely because of the high prices of materials and labor due largely to the European War, it is held in the Nebraska case of Re Omaha, L. & B. R. Co. P.U.R.1917A, 907, since the probable disturbance in the money market after the end of the war may prevent floating the securities.

Security issues — not issued until delivery to purchaser. Bonds are not "issued" under the California Public Utilities Act, it is held in the California case of Re Death Valley R. Co. P.U.R.1917A, 642, when they are merely executed and placed with the treasurer for sale, but only when they are executed and delivered to the purchaser.

Service — jurisdiction of Commission — devices at drawbridges to protect street railway cars. The Massachusetts Commission is held in Re Fort Point Channel Accident, P.U.R.1917A, 535, to have no jurisdiction over the location and illumination of highway gates operated and maintained by the municipal authorities to protect street railway and other traffic at drawbridge openings.

Service — meter boxes — who should bear expense. That water consumers not having basements or cellars suitable for meters installed by the utility may be required to provide suitable meter boxes or vaults at their own expense is held in the Wisconsin case of Wood v. La Farge, P.U.R.1917A, 763.

Service — power of Commission — extension on rental basis by mutual company. The Wisconsin Commission is held in Re North Lincoln Teleph. Co. P.U.R.1917A, 609, to have power to order extension of telephone service on a rental basis by a company which operates on a mutual or co-operative plan.

Service — power of Commission — street railways — repair of paving. That the New Jersey Commission will exercise its power to compel a street railway company to repair street paving which impairs the safety or convenience of passengers, independent of any power to enforce a municipal street paving ordinance, is held in the case of Trenton v. Trenton & M. C. Traction Corp. P.U.R. 1917A, 541.

Service — railroads — telephones in stations. The requirement of the Wisconsin statute (§ 1797g–1 and 2), that railroads install telephones in agency stations where telephone service is available, is held in Rasmussen v. Chicago, M. & St. P. R. Co. P.U.R.1917A, 618, to be satisfied by the installation of a pay telephone to be answered by the station agent.

Service — street railways — adequacy of service not dependent upon return. That the duty of a street railway to render adequate rush-hour service is not dependent upon ability to earn an adequate return, is held in the New York case of Re Brooklyn Heights R. Co. P.U.R.1917B, 325.

It is not a reasonable standard of service to operate street railway cars during rush hours with a standing load of from 60 to 100 per cent.

Set-off — insolvent estate — note and deposit account. A bank, it is held in the Massachusetts case of Laighton v. Brookline Trust Co. 114 N. E. 671, L.R.A.1917C, 129, may set off against immature notes of a depositor who dies insolvent the amount of his deposit account at the time of his death, but not money added thereto by the executor, under a statute permitting, in an action

by an executor, a set-off of a claim due from the testator.

This decision comes within the general rule laid down in many cases, that a debt due from a decedent cannot be set off against a claim arising after the decedent's death out of a transaction with the executor or administrator.

Valuation — property not in use — land — prospective use. No allowance was made for land not used in the gas business in a rate valuation of a gas plant, in the California case of Re San Diego Consol. Gas & E. Co. P.U.R. 1917A, 930, although the land was purchased for the future use of the utility.

Will — devise to illegal wife. A devise in favor of the woman with whom testator was living as his wife is held not void in the Illinois case of McDole v. Thurm, 114 N. E. 542, annotated in L.R.A.1917B, 1150, because the marriage between them occurred within the prohibited time after she was divorced from another.

Recent English and Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Insurance — loss — exception — "theft or dishonesty committed by servant." Under a policy of insurance against loss "except loss by theft or dishonesty committed by any servant in the exclusive employment of the assured," it is incumbent on the assured, seeking to recover for a loss by theft, to prove a theft by some person other than a servant in his exclusive employment, according to Hurst v. Evans [1917] 1 K. B. 352, in which it was said that, assuming the burden of proving a theft by the servant of the assured to lie on the insurer, he may establish such a theft by evidence which possibly might not be admitted or sufficient to convict in a criminal prosecution.

Landlord and tenant — covenant to make specific repairs in a particular year — termination of lease before expiration of year. Where a lease contains a covenant to execute specific repairs in a particular year if the lease shall be then subsisting, the obligation to perform the covenant attaches as soon as the year begins, and the fact that the lease is determined by the lessee by notice expiring before the end of the year does not relieve the lessee of his obligation to perform the covenant. Kirklinton v. Wood [1917] 1 K. B. 332.

Maintenance — success of plaintiff in maintained suit — damages recoverable. That an action for maintenance of a suit will lie although the maintained action has been decided in favor of the plaintiff, and that the measure of damages in such case will be the costs recoverable by the plaintiff in the maintained suit and the costs of defending the action, is held in Neville v. London Exp. Newspapers [1917] 1 K. B. 402.

Proximate cause — defective railroad crossing — attempt of third person to remedy condition. The negligence of the officers and servants of a government railway in failing to replace planks removed from between the rails of a highway crossing, and not the act of a third person in putting a round stick between the rails to assist sleighs in crossing the track, is the proximate cause of an injury sustained by one against whose foot the stick rolled while driving his sleigh over the crossing. Belanger v. Rex, 54 Can. S. C. 265, 34 D. L. R. 221.

Wills — verbally communicated bequest — validity. A bequest in a will in which testator directed his executor "to pay a certain person whom I have made known to him, and whose name I otherwise desire to be kept strictly secret, a certain sum of money as soon after my decease as can conveniently be done, the amount of which is to be kept secret, but which has been made known to him by me," is held, in Lemon v. Charlton, 44 N. B. 476, 34 D. L. R. 234 (though with some hesitation), to be a valid bequest.

QUAINT and CURIOUS

A sheaf of gleanings culled from wayside nooks.

A Poetic Will. "This is the last will and testament of me, Joseph Stratton, M. A., Oxon, Clerk in Holy Orders, Master of Lucas Hospital, Wokingham, Berks:

'Tis said in holy psalm that men decay
When decades seven of years have passed away,
And age that runs beyond this wonted span
Brings little of delight to lingering man.
As years full sixty-four, alas! have gone
Since I this earthly score first looked upon,
The time, I trow, will soon arrive when I
To this surprising world shall say good-by.
So, while my mind remains quite sound and clear,
My will shall be distinctly stated here.
I give my wife, when life I leave behind,
My property of every sort and kind,
A further point I also duly fix,
I make my wife my sole executrix.
(To meet all legal need I here proclaim
Louise C. B. L. Stratton is her name.)
But, if she will, she may, to those who've been
Faithful to me through any crucial scene,
Some token give from my possessions small,
Which me to their remembrance shall recall.
My body when it seems of life bereft,
I wish examined by a doctor deft;
Let him determine by some test well-known
That I am just as dead as any stone.
I care not, ere the vital spark has fled,
To make a close acquaintance with the dead.
No mourning garments need for me be worn,
When I set out for 'undiscovered bourne.'
But this does not imply I do not prize
The tear which gathers in affection's eyes."

Dated December 16, 1903.

Proved in London, England, February 13, 1917.

We are indebted to Mr. E. Vine Hall of London, Eng., author of "The Romance of Wills" for a copy of this novel document.

Curious Weapons. A member of the St. Louis bar tells the following story: A lawyer of Missouri, who shall be called Smith, was seized suddenly with an attack of temporary insanity, while traveling across that state.

Stepping off the train at a county seat where he was quite unknown, he walked into the bank and requested the cashier to grant him permission to warm himself by the stove. The cashier, noticing that Mr. Smith was a stranger of culture and refinement who seemed confused about something or other, invited him back of the railing. Inside the railing, Smith savagely attacked the cashier with his fists and gave him a beating. Smith was arrested, and then indicted by the grand jury (at the time in session) for assault with dangerous and deadly weapons.

At the trial Smith was defended by several prominent attorneys, who had rushed to his aid. One attorney sought

to quash the indictment on the ground that it charged assault with dangerous and deadly weapons, whereas the attack was made with fists, which were not dangerous and deadly. The circuit judge gravely announced his decision that Smith's fists were dangerous and deadly weapons. As the decision was reached, Smith was standing in front of the judge with his hands in his trousers' pockets. The attorney rushed to Smith and, pulling his client's hands from his pockets, exclaimed: "Here, you, get your hands out of there! Next you will be charged with carrying concealed weapons."

A Poser for the Judge. Writing of Polish temperament and talent, Sidney Whitman in "Things I Remember" has an amusing story of a bright Polish Jew who traded in chemicals. He was brought before the law courts for selling poison without fulfilling the legal enactments bearing on such transactions.

The magistrate proceeded to read the charge when the Jew suddenly interrupted him with the question: "Excuse me, Mr. President. Do you understand anything about chemicals?"

"Mr. S., the expert, is here in that capacity," replied the judge.

"And you, Mr. S." queried the Jew, "do you understand anything about law?"

"You have just heard from his worship that I am an expert in chemicals. If you want to know anything about law please address yourself to the judge."

"I ask you, Mr. President, just to consider the case for one moment. You are the judge of the court and admit that you do not understand anything about chemicals, and the expert tells us that he does not know anything about law. And I, a poor Jew, am expected to be familiar both with the law and with chemicals. Now, Mr. President, I ask you how you can possibly convict me?"

The Mule's Testimony. The originator of a widely known probation system, Judge William J. Pollard, of a St. Louis police court, is the subject of a story that illustrates a unique way of dealing out justice to minor offenders.

A driver had been brought before Judge Pollard, charged with cruelty to animals. He had been driving a galled mule, but he had an expert witness in a veterinarian, who testified that the sore on the mule's back did not pain the animal in the least.

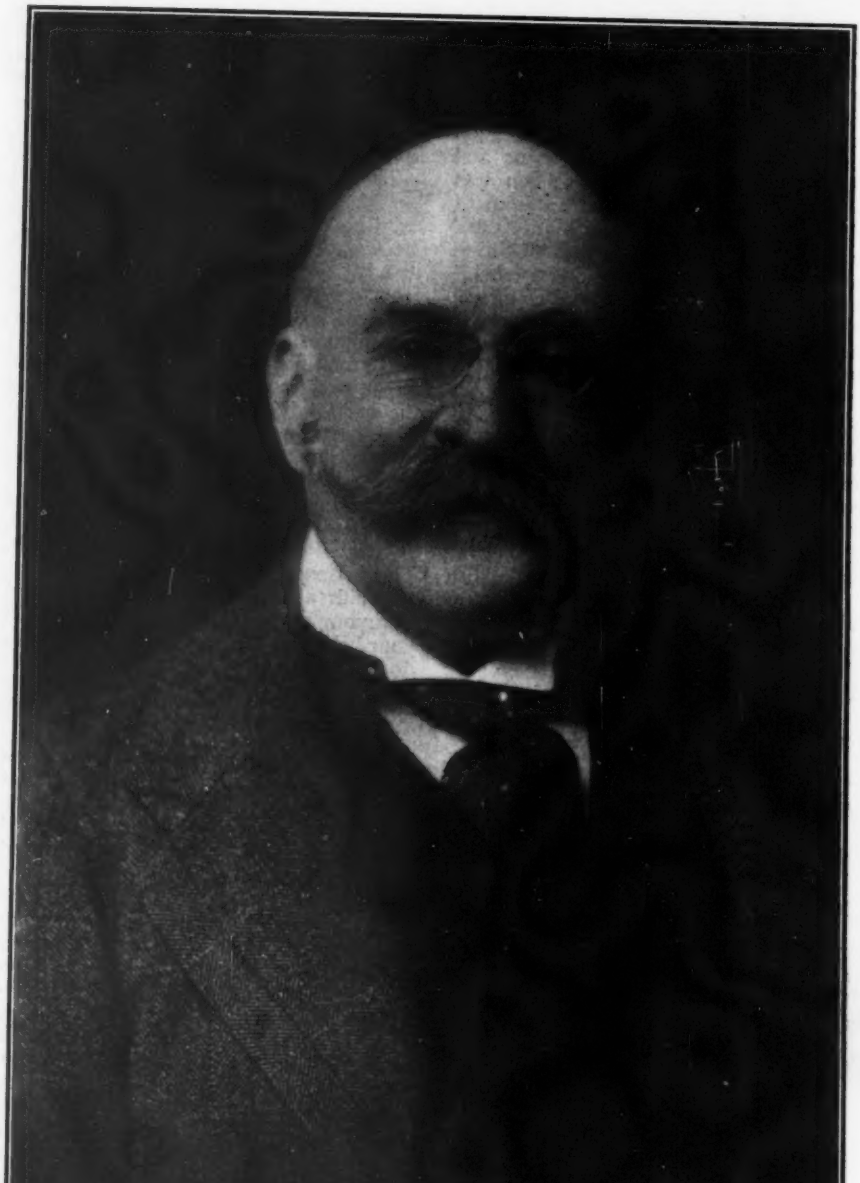
The judge listened attentively to the long technical opinion, and then demanded to know the mule's whereabouts. He was informed that it was harnessed to a wagon that stood in the street in front of the courthouse. The judge then ordered that court be adjourned for five minutes.

He took his cane and proceeded to the street, went up to the mule, and with the end of his cane gently touched the sore spot on the animal's back. The mule promptly tried to kick the dashboard off the wagon. Once again the judge touched the sore spot with his cane, and the mule responded as before.

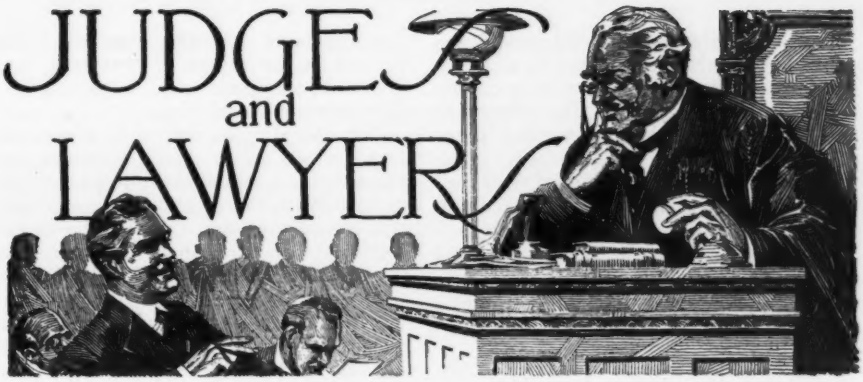
Judge Pollard returned to the bench. The prisoner was called before him.

"With all due respect to the expert testimony you have had introduced in your behalf to show that the mule's back does not pain him, I will fine you $50," announced the judge. "I asked the mule if the sore hurt him, and he said it did."

How to Manage Patriots. The policeman looked nervously at the great throng waiting to sign the loyalty pledge. His arm stripes, the New York Herald points out, showed that he had devoted thirty years to getting on with New York citizens. But he was disconsolate as he watched the crowd, which extended for more than 200 feet along the street and completely blocked the sidewalk. At last his sergeant came sauntering along. "Say, sergeant," he said, as that officer came alongside, "what'll I do? If I let 'em alone they're violatin' an ordinance, and if I chase 'em it's treason, ain't it?" "W-e-l-l," said the sergeant, surveying the situation, "I don't know. Tell you what you do. There's flags over that booth, an' these boys are full of battle. Go along and tell 'em to get closer to th' flag. Tell 'em to get right under the colors. They're just in the humor to do it." They were.



JOHN R. DOS PASSOS.



A Record of Bench and Bar

John R. Dos Passos

*BY HENRY WOLLMAN**

ALTHOUGH John R. Dos Passos was born in the second largest city of the United States, and spent all of his active professional and business life in New York city, he was the best type of what is called a country lawyer, and in my opinion that is paying him a very high compliment. The best country lawyer must try a criminal case well, must try a civil case well, and be a sound adviser in business affairs. In a great city like this, a trier of civil cases, with rare exceptions, tries no criminal cases, and the trier of criminal cases generally confines himself to the criminal courts, except occasionally to try a damage suit, and the great legal business advisers find that work so much more profitable than trying cases that some of them scarcely know where the courthouse is. John R. Dos Passos was an expert and an enthusiast in all three branches.

Although he was connected, as legal adviser, with many of the most important business transactions that occurred in this country in the past forty-five years, and although he tried many corporation cases of vast importance, not only on account of the moneys involved, but because of the precedents established, his love for the trial of criminal cases never diminished. Of John G. Johnson, of Philadelphia, for many years the acknowledged leader of the American bar, although he tried cases involving the largest amounts and yielding the best fees, it was said that he never refused to try the smallest case. That came within his conception of the office and duty of a real lawyer. It was much that way with Mr. Dos Passos.

Mr. Dos Passos was born in Philadelphia, of a Portuguese father and a Quaker mother. Before he could finish school, he entered the War of the Rebellion as a Union soldier. He was a natural fighter, and although too young to be taken as a soldier, he could not stay away, so he enlisted and fought. He took part in the Battle of Antietam. Shortly after the close of the war, he was admitted to the Philadelphia bar.

The same dream of big things that leads so many ambitious young men all over the United States to come to New York led his footsteps hither. Many of those young men are disappointed, but he was not,—he made good.

His first opportunity to make an impression in New York, which he certainly did in a most effective way, came through the trial of some celebrated criminal

* Spoken before the New York County Lawyers' Association, May 3rd, 1917.

cases. He defended a Frenchman by the name of Emil André, who, in a fit of jealousy, killed his wife on a public street in broad daylight. The crime was an atrocious one, and apparently without any justification. The defendant was indicted for murder in the first degree, but young Dos Passos, through his able and brilliant work, eventually succeeded in saving his client from the gallows, and in having him found guilty of a low degree of manslaughter. The results achieved by him in that case brought him many more criminal cases.

The Stokes-Fiske murder case in its time attracted as much attention as almost any case in the history of this country. Stokes, who was a member of one of the finest families in the city, was madly infatuated with Josie Mansfield, a beautiful woman, who apparently showed a preference for Colonel James Fiske, the partner of Jay Gould in the ownership of the Erie Railroad and in many other ventures, probably because Fiske was willing to give her more money than Stokes. Stokes, either so that there might be no divided ownership of Josie Mansfield, or to deprive Fiske of the advantage he had gained in the financial affections of that fascinating woman, killed Fiske. The press and public sentiment were against Stokes. Stokes had plenty of money and therefore was able to retain the best criminal lawyers. He retained three; among them was Dos Passos, then only twenty-eight years old. Fiske was convicted of murder in the first degree. The case was appealed. Dos Passos, because his principal associate was a very old man, did the lion's share of the work on the appeal, and in June, 1873, the decision was reversed. This case, in its turn, brought many criminal cases to Mr. Dos Passos.

When you look at the reports of our state courts, the Federal courts all over the country, and the United States Supreme Court, you will see how many very important civil and corporation cases Mr. Dos Passos tried. Take the case of Kent v. Quicksilver Min. Co. 78 N. Y. 159, 4 Mor. Min. Rep. 47, decided September, 1879, involving the most intricate questions with reference to the issuance of preferred stock, and read the extracts from Mr. Dos Passos's brief, printed in the report of that case, and you will soon see how thorough and efficient his legal work was.

Mr. Dos Passos was a fine business man and an adroit diplomat, which enabled him to accomplish wonders not only in formation, but also in the reorganization, of corporations. His work was not merely the preparation of the papers, but the creation of the plans for the formation or reorganization of the corporations. He was never the lead pencil, he was always in the thinking department. Mr. Dos Passos was one of the leading counsel in the formation of the American Sugar & Refining Company, colloquially called the "Sugar Trust," the American Thread Company, Cramp's Ship Works, and many other very large corporations.

Among the many institutions that Mr. Dos Passos assisted in reorganizing were the Texas & Pacific Railroad, the Reading Railroad and the Erie Railroad.

His fairness, and his grasp of the questions involved and of the conflicting rights of the parties, made him unusually successful in the settlement of bitter disputes and serious conflicts between big business interests.

Mr. Dos Passos was counsel for many New York stock exchange houses. He was confronted with the fact that there was no good book dealing with the law applicable to stock exchanges and stock-exchange transactions, and that there was a real necessity for one, so he wrote Dos Passos on "Stock Brokers and Stock Exchanges." It is recognized the world over as the standard work on the subject. It is considered the highest authority by the courts of this country and England, and is often cited by the Supreme Court of the United States as the basis for its decisions.

Mr. Dos Passos wrote many other books: "The Interstate Commerce Act," "The American Lawyer," "Anglo-Saxon Country," "The Antioption Bill," and "Law Reform," all first class, but none occupy the prominent or permanent place that his book on stock exchanges does and will.

One of his favorite subjects was the Sherman Law. His publications with reference to that law are extremely help-

ful to persons seeking to find out what that kaleidoscopic enactment means.

Mr. Dos Passos was an incessant worker and fighter for law reforms. His mind was never at rest, for he was always thinking what could be done to improve and reform things. He wrote valuable pamphlets, brochures, and magazine articles on these and many other subjects.

Mr. Dos Passos was a strong, graceful, and convincing speaker, and at times was very eloquent. He stumped the states of Pennsylvania and Virginia for his friend McKinley, making speeches that were not only brilliant, but converting. In private conversation, although he was forceful and persuasive, he was very charming.

Mr. Dos Passos, although very important public offices were offered to him, always refused them.

He was one of the founders and a director of the New York County Lawyers Association, and one of its staunchest supporters. During quite a long period, he quietly paid the annual dues of a number of the older members of this association, who had become unable to pay their own dues.

His brother, Benjamin Dos Passos, also a brilliant man, who had been an assistant district attorney and the author of a textbook on Intestate Succession, was, until the time of his death, in 1898, a law partner of Mr. Dos Passos. Mr. Dos Passos, out of reverence for the memory of his brother, retained the firm name of Dos Passos Bros. At the time of Mr. Dos Passos's death, Cyril Dos Passos, a son of Benjamin Dos Passos, was his partner.

Mr. Dos Passos for many years before his death was a widower. He and his son Louis, who was his only child, were just like two brothers, but the father always maintained that he was the younger brother.

Outside of work, his greatest passion was for the hills and dales, for the mountains and valleys, for the rivers and rivulets. He had a beautiful home in this city, but he loved to spend his apparent leisure—for he worked there too—on his 6,000-acre estate in Virginia.

Mr. Dos Passos was not actively affiliated with any church, and yet every Sunday that he was on his yacht, he called his crew around him and delivered a sermon to them.

He was a great walker. Winter and summer, hot or cold, he walked rapidly and briskly, without an overcoat, from his house on 56th street to his office, a distance of 4 or 5 miles. Very shortly before he died, he was troubled with gout, and his son induced him to ride up town in the son's, not his, motor car, but he was very anxious that nobody should see him in the automobile.

John R. Dos Passos never spared himself. He devoted himself assiduously and earnestly to his work. With a brain of the finest texture, it was not difficult for him, by dint of the deepest study, to master any subject in which he was interested, and therefore when he spoke or wrote or acted, it was with genuine and profound knowledge.

John R. Dos Passos, unaided, made for himself a great big position at the bar of New York and among the lawyers of the United States. He succeeded because he was entitled to succeed. On the 27th day of January, 1917, in the 73d year of his age, he died, honored and respected by every one who knew him.

Hon. Aaron S. Swartz

For Thirty Years President Judge of the Court of Common Pleas

HON. AARON S. SWARTZ, one of the best known judges in Pennsylvania, has presided over the courts of Montgomery county since 1887. He has made a reputation as a jurist, and has been frequently mentioned in connection with the supreme court bench of the state. Judge Swartz is the son of Jacob Swartz, of an old Pennsylvania-German family. He was born in Towamencin township, Montgomery county, February 24, 1849. He was reared on a farm, and his early education was obtained in the public schools and in Freeland Seminary, the predecessor of Ursinus College, at Collegeville. After completing the course at Freeland Seminary he entered Lafayette College at Easton, and graduated from that institution in 1871 with high honors. He accepted a position as principal of the public schools at Phœnixville, in Chester county, and taught there very successfully. Having decided to adopt the law as his profession, he entered the office of Gilbert Rodman Fox as a student, and was admitted to the bar of Montgomery county. in 1875, passing the requisite examination in May of that year. At that time he was deputy clerk of the United States district court for the eastern district of Pennsylvania. Soon after his admission to the bar he resigned this position, and at once devoted his entire time and attention to the practice of law in Norristown. In 1877 he was given the nomination for district attorney by the Republican party, of which he has always been a member, and, although the county had been usually Democratic, he was defeated by less than two hundred votes. He rose rapidly in his profession and soon enjoyed a large and constantly increasing practice, being recognized as a leading member of the bar at an age when most young lawyers are still waiting for clients. He was the nominee of the Republican party for the judgeship in 1881. In 1882 he became solicitor for the board of county commissioners, performing the duties of that responsible position with ability, sound judgment, and fidelity to the public interests. He continued in that position until his elevation to the bench in 1887. Among the more important of the earlier cases in his career as a lawyer was that of Moses Sutton, who was tried for the murder of Mrs. Roeder, at Blue Bell. The case was tried in 1878. He was associated with B. E. Chain, another prominent attorney, as counsel for the defense. The trial resulted in the acquit-

tal of Sutton. In 1887 when the legislature created the office of additional law judge in Montgomery county, Mr. Swartz was by common consent recognized as the person who should be chosen to fill the position. He was appointed to the office by Governor James A. Beaver, and soon became president judge by the death of Judge Boyer, and was elected to the position in November of that year by a large majority. Ten years later he was re-elected without opposition, the Democrats of the county making no nomination. As a judge, Aaron S. Swartz has made a splendid record. He is a close and steady worker, his indefatigable industry and conscientious fidelity to right and justice being his strongest characteristics on the bench. His opinions are models of clear statement and logical reasoning, showing the results of careful research and earnest work. His decisions in a multitude of cases brought before him are the best evidence of his sound judgment and his care in reaching his conclusions.

Judge Swartz is prominent in the First Presbyterian Church of Norristown, and has been for many years the earnest and esteemed superintendent of its Sunday school. Firm in his religious convictions, he is a model citizen, always manifesting an active interest in the welfare of the community in which he lives, and in the affairs of the county, the state and the nation. In manner he is dignified, but always affable and kind to all.

The Montgomery County Bar Association recently tendered Judge Swartz a complimentary dinner on his completion of thirty years' service on the bench. About one hundred members of the bar were present.

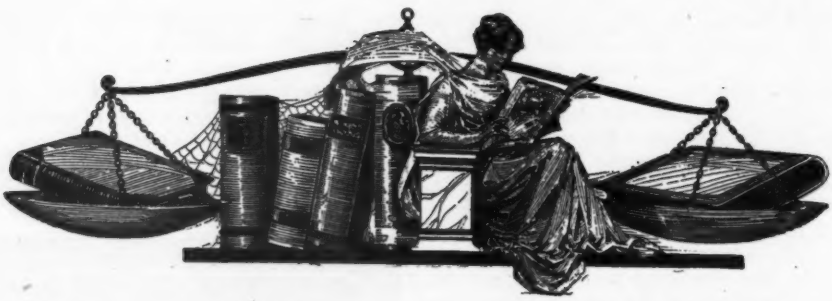
Said the toastmaster, Judge Solly, "Not once since 1909 has an opinion of Judge Swartz been reversed by the appellate court,—a remarkable record, indeed; none like it anywhere in the state of Pennsylvania. And he has always held the scales of justice evenly. He has not known rich or poor, politics, party, or faction, but has always upheld the Constitution and the laws. Never has the breath of scandal been breathed against him. He does everything to-day with the same thoroughness as he did thirty years ago. He is held in the highest esteem by the public, and in honoring him we honor ourselves as a bar."

One of the South's Successful Women Lawyers

Photograph by Harris & Ewing (Wash.).
From Paul Thompson, New York.
MARGARET H. ERVIN.

Miss Margaret H. Ervin of Chattanooga, Tennessee, has attained a good measure of success in her chosen profession.

She was reared on Lookout Mountain and obtained her legal education in Tennessee. She is President of the Tennessee Equal Suffrage Association and a member of the National Council of the National American Woman Suffrage Association. At the last Democratic National Convention she sat with the Tennessee delegation.



New Books and Periodicals

Men disparage not antiquity who prudently exalt new inquiries.—Sir Thomas Browne.

"Business Finance." By William H. Lough. (Ronald Press Co., New York.) $3.00.

In this work may be found much information on important subjects which have hitherto been treated scantily, if at all. The author deals with the everyday financial problems of a private business concern, from the point of view of an organizer or financial manager of an enterprise. He describes the different forms of financial organization of business enterprises; discusses the various forms of security issues and the methods of raising capital through their sale; treats of efficient financial management, the investment of capital funds, the amount required for working capital, the management of capital and income through budgets, and of financial involvements, and the processes of reorganization.

Lawyers are frequently called upon to advise as to financial questions, and will find it to their advantage to peruse this book.

"Criminal Sociology." By Enrico Ferri. (Little, Brown, & Company, Boston.) $5.00 net.

The ninth volume in the Modern Criminal Science Series is Professor Enrico Ferri's "Criminal Sociology."

"The distinctive contribution of Ferri to the science of criminology," we are told, "has been his insistence that crime is mainly a social phenomenon, though not to be interpreted exclusively as such. He has sought to reconcile the physical and anthropological with the social elements in the phenomenon of crime. In this he has been highly successful."

Professor Ferri is entitled to a very high rank among sociologists who have studied the problem of crime. In presenting this translation of his greatest work, the American Institute of Criminal Law and Criminology has rendered an important service. "Its readers," as Judge Quincy A. Myers observes in his introductory comment, "will find in the scientific arrangement and analysis of the work itself ample food for reflection. Those interested in the science will here find added inducement to further study and elaboration of these important subjects, so closely allied to the everyday experience of all who have to deal with them in an administrative capacity."

"The Government of the Philippine Islands: Its Development and Fundamentals." By George A. Malcolm, Dean of the College of Law, University of the Philippines. (The Lawyers Co-operative Publishing Company, Rochester, N. Y.) $2.50.

The writer of this book has been for several years a professor of public law in the University of the Philippines, and his work has the advantage of having been prepared by one who has lived under Philippine government and who is able to speak understandingly of, and to deal sympathetically with, Philippine institutions.

In discussing his subject Professor Malcolm has aimed to preserve a judicial attitude, and he substantiates his statements by a constant and extensive citation of authorities. After an introductory chapter devoted to the Philippine Islands and their government, the author discusses the pre-Spanish era, the Spanish Administration, the revolutionary government, and the American administration. The latter part of the volume treats of the status of the Philippines, their relations to the United States, of the organic law and of the influence still exerted on Philippine law by the Mohammedan, canon, and civil-law systems.

This volume, consisting of 763 pages besides the index, is a storehouse of information concerning the topic, of which it treats.

Walker, Errors in Civil Proceedings, $7.50.

Alexander, Commentaries on Wills, 3 vols. Price to advance subscribers, $20.25.

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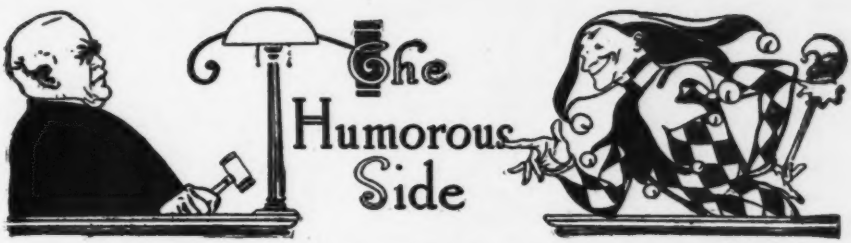

"E'en grim visaged Law can smooth his wrinkled front and smile."

Anecdotes of the Bar. North Todd Gentry, a lawyer of Columbia, Missouri, has compiled a volume called "The Bench and Bar of Boone County, Missouri."

Here are a few of the amusing stories told by and about Boone county lawyers and judges, some of whom have been dead many years:

During one of the campaigns of Judge George H. Burckhardt he was introduced to a young attorney.

The judge shook hands with him very cordially and asked about his father.

"Father is dead," said the lawyer.

"Why, yes, I know that; I meant to ask how is your mother?"

"Judge, mother died before father did."

"Well, well! How are you?"

An hour later Judge Burckhardt again met the young man.

"And how is your father?"

"He's still dead, Judge."

A lawyer practising in the court of Judge John D. Leland was noted for not paying his debts. On one occasion the lawyer was in contempt of court and the judge fined him $5. The attorney asked the court where he would get the money, and Leland suggested that he borrow it from a friend.

"Well, Judge," said the lawyer, "you're the best friend I have. Lend me $5."

"Mr. Clerk," said the judge, "you may remit the fine. The state of Missouri is better able to lose that $5 than I am."

Peyton R. Hayden was long a conspicuous figure among the lawyers of Boone county. While he was fond of studying law books, he cared little about literature.

During a recess one day in the Boone county courthouse a lawyer named Field from Lafayette county asked him what he thought of Byron's "Childe Harold." Hayden replied: "Egad, sir, I did not know that Byron had a child named Harold."

"The first thing I did as probate judge," said Judge John F. Murry, "was to talk to a woman who wanted to be her husband's 'executioner.' I was relieved when she told me that he was dead."

President of Ireland. Mike Cooper, with a brogue, recently presented himself to Justice Sears, of Medina, for his naturalization papers.

"Where were you born?" asked Justice Sears.

"In Ireland," said Cooper.

"How long have you lived in this country?"

"Eighteen years."

"What is the form of government in this country?"

"Republican form of government."

"Who is President of the United States?"

"Woodrow Wilson."

"Who was President of Ireland when you left there?" said Justice Sears.

"Begorra, I war, till I left there," coolly observed Mike.

He got his papers.

Saw Him First. A Quaker had gotten himself into trouble with the authori-

ties, and the sheriff called to escort him to the lockup.

"Is your husband in?" he inquired of the good wife who came to the door.

"My husband will see thee," she replied. "Come in."

The sheriff entered, was bidden to make himself at home, and was hospitably entertained for half an hour, but no husband appeared. At last the sheriff grew impatient.

"Look here," he said, "I thought you said your husband would see me."

"He has seen thee," was the calm reply, "but he did not like thy looks and has gone another way."—Harper's Weekly.

No Liar. "Did you notice any suspicious characters in that locality?" queried the court.

"Sure, yer honor," returned the newly appointed officer, "I saw but the one man, an' I asked him what he was doing there at that time o' night. Sez he, 'I have no business here just now, but I expect to open a jewelry store in this vicinity later on.' At that I sez, 'I wish you success, sor.' "

"Yes," said the magistrate, plainly disgusted. "He did open a jewelry store in the vicinity later on and stole a tray of rings and nine gold watches."

"Well, begorra," answered the policeman, after a reflective pause, "the man may have been a thafe, but he was no liar."—Chicago City (Ind.) News.

She Gave Her Testimony. Senator Tillman, discussing an investigation, said the other day:

"Some evidence is malicious. It reminds me of old Mrs. Bing.

"Mrs. Bing, a thin, wiry old lady, took the stand in a case against one John Bang. The lawyer began:

" 'Now, madam, you will please give your evidence in as few words as possible. You know the defendant?'

" 'Know who?'

" 'The defendant, Mr. Joshua Bang.

" 'Josh Bang! I reckon I do know him, and I don't now nothin' to his credit, nuther. Why'—

" 'Please answer "yes" or "no" to my questions.'

" 'What questions?'

" 'Do you know Mr. Joshua Bang?'

" 'You ask Josh Bang if I know him! Ask him if he knows anything about tryin' to cheat a pore lone widder like me out of a three-year-old cow. Ask,—

" 'Now, madam'—

" 'Ask Josh Bang's wife about that thar brick she put in a batch o' butter she sold last summer. Ask'—

" 'These matters, madam, have nothing to do with'—

" 'Ask John Bang about lettin' his old mother die in the almshouse. Ask Mehitabil Bang about the time she was caught in a neighbor's field milkin' four cows on the sly. Ask'—

" 'Really, madam, do you know anything about this case or do you not?'

" 'No, I don't know nothin' about it, but I've had it in for them Bangs for the last thirty-seven years, and I got myself called as a witness so as to get even. I guess I've done it, too. Good afternoon, sir.' "—Washington Star.

Good Enough. An Irishman was charged with a petty offense. "Have you anyone in court who will vouch for your good character?" queried the judge.

"Yes, sorr: there is the chief constable yonder," answered Pat.

The chief constable was amazed, "Why, your Honor, I don't even know the man," protested he.

"Now, sorr," broke in Pat, "I have lived in the borough for nearly twenty years, and if the chief constable doesn't know me yet, isn't that a character for yez?"—Rochester Evening Times.

Had the Wrong Idea. Joe Allen, the varnish man, claims that the oldest joke is the one about the negro who had never seen a finger-print impression photographed. A henroost was robbed one night and the owner found some finger prints in the dirt. He had one of these photographed and the photograph enlarged. The finger print was traced to a negro named Mose, and after being accused, Mose admitted his guilt after seeing the enlarged impression, but added: "How did yo' all git that photograph of them corduroy pants I wore that night?"—Detroit Free Press.